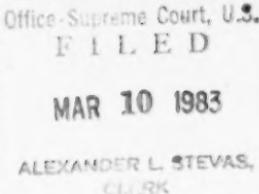


82-1504

No.



In the Supreme Court of the United States

October Term, 1982

**L. G. EVERIST, INC.,
Petitioner,**

vs.

THE UNITED STATES.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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QUESTIONS PRESENTED

In an action brought by a Government contractor under §10(a) of the Contract Disputes Act of 1978 (41 U.S.C. §609(a)):

1. Did the Court of Claims err by holding that, for purposes of summary judgment under Court of Claims Rule 101(d), only disputes as to "underlying," evidentiary facts, and not disputes as to inferences and conclusions of fact, shall constitute issues of "material fact"?
2. Do the conflicting inferences and conclusions of fact drawn by the parties raise genuine issues as to ultimate facts material to petitioner's causes of action:
 - (a) for breach of contract by misrepresentation;
 - (b) for an equitable adjustment under the contract Differing Site Conditions clause; and
 - (c) for breach of contract by non-disclosure of superior knowledge;

which preclude summary judgment under Court of Claims Rule 101(d)?

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THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Claims entered on September 24, 1982.

OPINIONS BELOW

The opinion of the United States Court of Claims, not reported, is presented in the Appendix hereto at App. A1-A12.¹ There are no other opinions in this case.

JURISDICTION

The judgment of the United States Court of Claims was entered on September 24, 1982. On October 8, 1982,

1. References to the Appendix are to "App."

petitioner timely filed a petition for rehearing and suggestions for rehearing *en banc* with the Court of Appeals for the Federal Circuit pursuant to §403(c) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. (App. A14) On December 13, 1982 the Court of Appeals for the Federal Circuit denied the petition for rehearing and suggestions for rehearing *en banc*. (App. A13) Jurisdiction is invoked under both 28 U.S.C. §1254(1) and 28 U.S.C. §1255(1).

STATUTES INVOLVED

1. 41 U.S.C. §609(a)(1) (Supp. III 1979) which provides:

"(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under Section 6 [41 USC §605] to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary."
2. 41 U.S.C. §609(a)(3) (Supp. III 1979) which provides:

"(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed *de novo* in accordance with the rules of the appropriate court."
3. 28 U.S.C. §2503 (1976 ed.) which provided:

"(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accor-

dance with rules and orders of the court, commissioners shall fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

"(b) The rules of the court shall provide for the filing in court of the commissioner's report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner."²

4. 28 U.S.C. §2071 (1976 ed.) which provides:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

5. Court of Claims Summary Judgment Rule 101(d) which provided:

"(d) *Motion and Proceedings Thereon:* After a motion for summary judgment has been filed, and after the expiration of the time allowed for a response thereto or for a reply to the response, if any (Rule 52

2. Pursuant to Court of Claims General Order No. 2 of 1973, after August 1, 1973, "Commissioners" of the Court of Claims were known and referred to as "Trial Judges."

(b)), such motion may (subject to the provisions of Rules 54(b), 146(b)(2), and 166(b)) be assigned to the calendar. (See Rule 14(b)(2).) The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

28 U.S.C. App. p. 627 (1976 ed.)

STATEMENT OF THE CASE

Petitioner brought this action in the United States Court of Claims pursuant to 41 U.S.C. §609(a)(1) for the trial *de novo* of its contract and breach of contract claims. No trial, however, was ever held and accordingly no findings of fact were ever prepared by the Court of Claims Trial Judge to whom the case was originally assigned.

On March 16, 1979, the United States, acting by and through the Department of Agriculture, Soil Conservation Service, issued an Invitation for Bids for the "Aravaipa Creek Emergency Watershed Project" (the "Project"). (App. A15) The Project contract work, as detailed in the construction specifications, called for the excavation, selection, handling and placement of 75,000 tons of rock riprap. (App. A16; A19) Construction Specification 216-8 directed that the rock riprap was to be excavated from "the designated sources, or from other sources approved by the Engineer." (App. A19) Bid opening was scheduled for April 11, 1979.

Pursuant to a special "INSPECTION OF WORKSITE" provision contained in the Invitation for Bids, the Project

Engineer (who was also the authorized representative of the Contracting Officer) conducted a group showing of the Project worksite, including the Government-designated Project rock source, on April 4, 1979. (App. A16; A26) When the tour group arrived at the Government-designated rock source (also known as the "Lackner quarry"), the Project Engineer proceeded to designate the precise location of the source, advising the prospective bidders that the "designated area was approved." (App. A27-A28) The Project Engineer further stated that the rock at the source was "approved" and that the Government geologist had investigated the source and had determined that it was rock "of quality" and "hard enough for riprap." (App. A27-A28)

Contrary to the pre-bid representations of the Project Engineer, however, the Government geologist had in fact *not* approved the rock at the Government-designated rock source. Rather, on the basis of his geological investigations conducted in November, 1978, he had determined that the risk of an "excessive breakdown of the rock" resulting in "an excessive quantity of undersized materials" existed at that source. (App. A20) By "excessive," he testified that: "I meant the breakage would be more than average or normal." (App. A39) The geologist prepared a geological Trip Report dated November 27, 1978 expressly advising the Soil Conservation Service engineers, including the Project Engineer, of this risk and further stating that "a determination to use this source should be contingent upon the results of the laboratory tests *in conjunction with* test quarrying to evaluate the breakdown characteristics of the rock." (App. A20-A21; A40) (Emphasis added.) Notwithstanding the specific recommendations of its geologist, the Soil Conservation Service made conscious decision not to test quarry the rock source. (App. A55-A56)

The November 27, 1978 geological Trip Report, and the conclusions and recommendations of the Government geologist contained therein, were never disclosed to the prospective bidders. (App. A4)

On April 9, 1979 petitioner's Construction Manager conducted a pre-bid inspection of the Project worksite, including the Government-designated rock source. He had been informed by petitioner's Construction Superintendent, who had attended the April 4, 1979, "worksite" showing, that the Government-designated rock source was an approved source and that the rock within the source was approved. (App. A48) The petitioner's Construction Manager, who prepared petitioner's bid for the project, testified that: "The rock source appeared to me to be competent, suitable for the use intended and we had been informed that it was an approved source and the rock in the source had been approved, which indicated to me that construction losses would certainly be within normal amounts, ratios." (App. A50) Accordingly, he included a 15% allowance for waste material in petitioner's bid estimate for the Project. (App. A51) The Government geologist testified that a high percentage of useable rock would be the normal recovery rate to be expected from a good commercial riprap quarry site. (App. A42)

On April 11, 1979, petitioner submitted the low bid for the Project, and on May 2, 1979, petitioner was awarded the contract for the Project, under its company trade name of "Connolly-Pacific Co." Following award of the contract, petitioner commenced the excavation and handling of rock from the Government-designated rock source, in accordance with Construction Specification 216-8. After substantial excavation into the bedrock, however, it became apparent that, contrary to the Government's represen-

tations, the vast bulk of the rock at the source was indeed wholly unsuitable for use as riprap. Due to the uncontrollable tendency of the rock to break down excessively into fines and fragments less than 3 inches in size during excavation and handling, over 60-70% of the total rock material excavated from the source was unsuitable for use as riprap. (App. A22-A24) The record establishes, and the Court of Claims has found in its order, that the waste encountered by petitioner at the Government-designated rock source was excessive. (App. A6; A42; A54-A55)

Petitioner gave timely notice under Clause 4, "DIFFERING SITE CONDITIONS," of the contract General Conditions that the excessive waste rock condition at the Government-designated rock source constituted a compensable differing site condition entitling petitioner to an equitable adjustment to the contract price and time for performance. (App. A17-A18) With the Government's permission petitioner attempted to obtain better rock from another source located nearby on the north side of the Right Prong of Fourmile Creek, an area which had originally been specifically disapproved by the Project Engineer. (App. A27-A28; A35; A51) The rock on the north side of the creek, however, proved to be of equally poor quality. No other rock sources were available as feasible alternatives. (App. A35; A49)

Petitioner ultimately completed the Project on January 9, 1980, more than 75 days beyond the original 150 calendar days allowed for contract performance. The Government assessed petitioner \$13,845.00 in liquidated damages, retaining \$195.00 for each calendar day of delay after October 29, 1979.

On February 18, 1980, petitioner submitted ~~the~~ total claim for an equitable adjustment to the contract price in

the amount of \$478,268 for the excessive waste rock condition, together with a claim for the full remission of the \$13,845.00 in retained liquidated damages. Following the submission of the claims, the Government released the November 27, 1978 geological Trip Report, pursuant to a Freedom of Information Act request by the petitioner. (5 U.S.C. §552(a) et seq.) On August 15, 1980, petitioner's written claims were certified pursuant to 41 U.S.C. §605(c)(1). On September 11, 1980, the Contracting Officer issued a final decision denying the claims.

On October 21, 1980 petitioner brought an action on its claims against the United States directly in the United States Court of Claims pursuant to 41 U.S.C. §609(a)(1), for the trial *de novo* of its differing site condition claim and its breach of contract actions based upon fraudulent misrepresentation and non-disclosure of superior knowledge.

On March 23, 1982, the Government filed a motion for summary judgment under Court of Claims Rule 101, contending that "there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law." The Government alleged that the Government-designated rock source was not "at the site" within the intended meaning of the differing site conditions clause; that there were no erroneous representations; and that the Government's knowledge concerning the Government-designated rock source was not superior knowledge. Included with its motion were a 51-page brief, and 119 pages of appended materials.

In response to that motion, petitioner filed a 68-page brief in opposition, together with 214 pages of appended documentary exhibits and deposition transcripts, vigorously challenging the contention of the United States that

there was no genuine issue as to any material fact. On August 12, 1982 the Government filed a 33-page reply brief, together with 14 pages of appendix materials. The total record before the Court of Claims on the motion for summary judgment consisted of over 475 pages of depositions, affidavits and exhibits.³

On September 24, 1982, the Court of Claims entered an order, without oral argument, granting the United States' motion for summary judgment. In addressing the question of whether the Government had demonstrated that there was no genuine issue as to any material fact, the court stated on page 2 of its order:

"Before reciting the facts, we note our conclusion that there are no genuine issues of material fact in the record which would, in themselves, preclude summary judgment. While the *inferences and conclusions drawn from the facts by the parties differ radically at times*, the underlying material facts are not in genuine dispute." (App. A2) (Emphasis added.)

On September 30, 1982, the Court of Claims concluded business. On October 8, 1982, petitioner timely filed a petition for rehearing and suggestions for rehearing *en banc* with the United States Court of Appeals for the Federal Circuit in accordance with §403(c) of the Federal Courts Improvement Act of 1982. On December 13, 1982, the Court of Appeals for the Federal Circuit denied the petition for rehearing and suggestions for rehearing *en banc*, without opinion. (App. A13)

3. Material portions of that record are contained in the Appendix on pages A15 through A58.

ARGUMENT**I. THE COURT OF CLAIMS HAS PRESCRIBED AN IMPROPER STANDARD OF REVIEW FOR SUMMARY JUDGMENT**

The Court of Claims has prescribed a summary judgment rule in this case which is in direct conflict with the rules of practice and procedure prescribed by the Supreme Court and which flatly contravenes petitioner's statutory right to trial *de novo* under the Contract Disputes Act of 1978. The Court of Claims has, by its ruling and order in this case, so fundamentally erred and so completely departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The rule-making authority of the Court of Claims is based upon, and subject to, 28 U.S.C. §2071, which provides:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with *Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.*" (Emphasis added.)

See: *Moore-McCormack Lines, Inc. v. United States*, 175 Ct. Cl. 496, 501 (1966); *Kamen Soap Products Co. v. United States*, 124 Ct. Cl. 519, 536-537, 110 F. Supp. 430, 439-440 (1953).

Rule 56(c) of the Federal Rules of Civil Procedure, prescribed by the Supreme Court pursuant to 28 U.S.C. §2072, expressly provides that summary judgment may be rendered only where the "pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pursuant to 28 U.S.C. §2071, the Court of Claims has adopted Rule 101(d) which, in words identical to those of Rule 56(c), Fed. R. Civ. P., provides that summary judgment may be rendered only where it has been shown that there "is no genuine issue as to any material fact."⁴

While Rule 56(c), Fed. R. Civ. P., and Rule 101(d) of the Rules of the Court of Claims both expressly provide that summary judgment may be rendered only where it has been shown that there is "no genuine issue as to any material fact," the Court of Claims has nonetheless held, by its ruling in this case, that only those disputes as to the underlying, evidentiary facts themselves shall constitute issues of fact for purposes of summary judgment. On page 2 of its order, the Court of Claims states:

"Before reciting the facts, we note our conclusion that there are no genuine issues of material fact in the record which would, in themselves, preclude summary judgment. While the *inferences and conclusions drawn from the facts by the parties differ radically at times*, the underlying material facts are not in genuine dispute." (App. A2) (Emphasis added.)

In spite of the fact that the inferences and conclusions drawn from the underlying facts by the parties do indeed differ radically, the Court of Claims has proceeded to summary judgment based solely and expressly upon the con-

4. Rule 101(d) of the Rules of the Court of Claims is itself based upon Rule 56(c), Fed. R. Civ. P. See 28 U.S.C. App. pp. 607-608, "Cross-Reference Table" to Rules of the Court of Claims; and see generally, Lydon, *The 1969 Rules Revision for the United States Court of Claims*, 58 Geo. L.J. 317 (1969).

clusion that the "underlying" facts contained in the record are *themselves* not in genuine dispute.

In the leading case of *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993 (1962), the Supreme Court held that, where differing inferences may properly be drawn from the "underlying" facts contained in the record, issues of ultimate fact are thus raised, and the case is not one for summary judgment.

"[The District Court's] findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n* it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56(c), 28 U.S.C.A." 369 U.S. at 655, 82 S. Ct. at 994.

The Supreme Court reaffirmed this principle in *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 157-160, 90 S. Ct. 1598, 1608-1609 (1970), pointing out that the burden is upon the moving party to establish the absence of a genuine issue as to any material fact, including any inferences of fact, and that such inferences of fact must be viewed in the light most favorable to the party opposing the motion.

The United States Courts of Appeals have uniformly observed this fundamental rule of *Diebold*. Thus, in *Central National Life Insurance Co. v. Fidelity and Deposit Company of Maryland*, 626 F. 2d 537, 539 (CA 7 1980), the Court of Appeals for the Seventh Circuit held:

"Equally well settled is the fact that summary judgment under Rule 56, Fed. R. Civ. P., should be granted only where it is perfectly clear that there is no dispute about either the facts of the controversy or the inferences to be drawn from such facts. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962). Accordingly, even though there may be no dispute about the basic facts, still summary judgment will be inappropriate, if the parties disagree on the inferences which may reasonably be drawn from those undisputed facts." 626 F. 2d at 539-540. (Emphasis in original.)⁵

By its ruling in this case, the Court of Claims has placed itself in direct conflict with the Supreme Court and all of the other United States Courts of Appeals, except the Court of Appeals for the Federal Circuit.

This summary judgment rule prescribed by the Court of Claims also violates petitioner's statutory right to trial *de novo* under the Contract Disputes Act of 1978. Under 41 U.S.C. §609(a)(3), all "direct access" actions by Government contractors are to proceed *de novo*, "in accordance with the rules of the appropriate court." In *Paul E. Lehman, Inc. v. United States*, 673 F. 2d 352, 353 (Ct. Cl. 1982), the Court of Claims thus recognized that in

5. See also: *Empire Electronics Co. v. United States*, 311 F. 2d 175, 180-181 (CA 2 1962); *Morrison v. Nissan Co., Ltd.*, 601 F. 2d 139, 141 (CA 4 1979); *Insurance Company of North America v. Bosworth Construction Co.*, 469 F. 2d 1266, 1268 (CA 5 1972); *United States v. Perry*, 431 F. 2d 1020, 1022 (CA 9 1970); *Luckett v. Bethlehem Steel Corp.*, 618 F. 2d 1373, 1377 (CA 10 1980).

such actions "the court conducts a trial *de novo.*" More specifically, prior to October 1, 1982, 28 U.S.C. §2503(a) and (b) expressly provided that parties to any suit in the Court of Claims were to be entitled to produce evidence and examine witnesses before a Court of Claims Trial Judge, and to have a report prepared by that Trial Judge of his findings of fact in the case.⁶ No such findings of fact were ever prepared in this case, in spite of the fact that, as the Court of Claims itself observes, the inferences and conclusions of fact drawn by the parties from the "underlying" facts differ radically.

Instead, the Court of Claims has undertaken to fashion an order of summary judgment, disposing of all of the issues of fact in this complex case, based entirely upon the selection of various alleged inferences of fact asserted by the Government in support of its version of the case. "Selecting one set of conflicting inferences, as opposed to another, is part of the ultimate factfinding process, not of the disposition at the summary judgment stage." *Cole v. Cole*, 633 F. 2d 1083, 1089 (CA 4 1980). On a motion for summary judgment, a court may not "speculate as to the ultimate findings of fact." *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 506, 89 S. Ct. 1252, 1260 (1969); *Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F. 2d 391, 393 (CA 9 1977).

As shown in Part II., *infra*, this case turns upon complex and crucial issues of ultimate fact involving knowledge, state of mind and contractual intent, issues which are

6. In accordance with 28 U.S.C. §2503(a) and (b), Rules 13, 133, and 134 of the Rules of the Court of Claims provide that in all trials in that court, testimony shall be taken "in open court"; that the Court of Claims Trial Judge shall be responsible in the first instance for all findings of fact; that the Trial Judge shall declare the proof closed only after the complete presentation of evidence; and that after the closing of evidence, the Trial Judge shall ascertain the facts from the evidence and file a report of his findings of fact with the Clerk, which report shall constitute a part of the record. 28 U.S.C. App. pp. 609, 631-633.

wholly inappropriate for disposition on a motion for summary judgment. *Fitzsimmons v. Best*, 528 F. 2d 692, 694 (CA 7 1976); *Heyman v. Commerce and Industry Insurance Company*, 524 F. 2d 1317, 1319-1321 (CA 2 1975); *Charbonnages De France v. Smith*, 597 F. 2d 406, 414 (CA 4 1979). In undertaking to decide this case on a motion for summary judgment, *in the face of admittedly conflicting inferences of fact*, the Court of Claims has denied petitioner its fundamental statutory right to the trial *de novo* of all issues of fact, including all issues of ultimate fact. *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F. 2d 272, 279 (CA 2 1967).⁷

Moreover, this case presents issues of continuing critical importance for the administration of the Contract Disputes Act of 1978 by the recently established Court of Appeals for the Federal Circuit. In its petition for rehearing and suggestions for rehearing *en banc* filed with the Court of Appeals for the Federal Circuit, petitioner urged that court to reconsider the September 24, 1982 order of the Court of Claims as being in direct conflict with the rule of *Diebold*, and in clear violation of petitioner's statutory right to trial *de novo* under 41 U.S.C. §609(a)(3). The Court of Appeals denied the petition for rehearing and suggestions for rehearing *en banc*, without any explication or modification of the earlier order of the Court of Claims. (App. A13) In failing to rectify this fundamental error of the Court of Claims, the Court of Appeals for the Federal Circuit has itself

7. See also: *Evans, Current Procedures in the Court of Claims*, 55 Geo. L.J. 422, 426 n. 37 (1966), specifically pointing out that where conflicting inferences of fact are drawn by the parties, "the facts requisite for decision can be adequately determined only through the usual method of submission of findings of fact to the commissioner and his preparation of a report in the conventional manner." (Commissioner Evans was Chairman of the Court of Claims Committee on Rules from 1959 to 1968).

so far sanctioned a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, in its first published decision, dated October 28, 1982, the Court of Appeals for the Federal Circuit expressly adopted, as binding precedent for the new judicial circuit, all of the holdings of the Court of Claims announced prior to the close of business on September 30, 1982. *South Corporation v. United States*, 690 F. 2d 1368, 1369 (CAFC 1982).⁸ In so adopting the holding of the Court of Claims in the instant case, the Court of Appeals for the Federal Circuit has placed itself, and its Federal judicial circuit, squarely in conflict with the Supreme Court and the other United States Courts of Appeals, and has effectively prescribed a procedural rule which essentially vitiates the Government contractor's statutory right to trial *de novo* under 41 U.S.C. §609(a) (3).

II. CONFLICTING INFERENCES OF FACT RAISE GENUINE ISSUES OF ULTIMATE MATERIAL FACT

A. Breach of Contract Based Upon Misrepresentation

1. Construction Specification 216-8, Rock Riprap, provides that "Rock from the designated sources, or from other sources approved by the Engineer shall be excavated, selected, and handled as necessary to meet the grading requirements in Section 8 of this specification or on the drawing" and that "[t]he suitability of the rock for riprap shall be approved by the Engineer." (App. A19)

8. Accordingly, the United States Claims Court will be subject to the holding of the Court of Claims in this case. Under §161(10) of the Federal Courts Improvement Act of 1982, effective October 1, 1982, the Claims Court succeeded to the trial jurisdiction of the Court of Claims under 41 U.S.C. §609(a).

According to his own testimony, Mr. Kilcrease, the Project Engineer, advised the prospective bidders during the pre-bid "worksite" tour of the Government-designated rock source (a) that the source itself was approved; (b) that the Government geologist had investigated the source and had determined that it was rock "of quality" and "hard enough for riprap"; and (c) that the rock at the source was approved. (App. A27-A28)

Mr. George Spencer, petitioner's Construction Manager, who prepared petitioner's bid, testified as follows concerning his understanding of the specifications and the Project Engineer's representations concerning the Government-designated rock source:

- (a) "If a deposit was approved as a rock source it would indicate to me that there was rock within that source that would meet the specifications as set forth in the documents. If the rock in that rock source were approved it would indicate to me that *the bulk of that deposit would be suitable for the use intended.*" (App. A46) (Emphasis added.)
- (b) "In that connection I was led to believe that approval at the prebid showing was a *valid indication of the integrity of the source.* It meant to me that *material from this source would be suitable for construction of this project in accordance with the contract documents.*" (App. A48) (Emphasis added.)
- (c) "The rock source appeared to me to be competent, suitable for the use intended and we had been informed that it was an approved source and the rock in the source had been approved, *which indicated to me that the construction losses would certainly be within normal amounts, ratios.*" (App. A50) (Emphasis added.)

A high percentage of useable rock is the "normal" amount of recovery which should be expected from a good commercial riprap quarry. (App. A42) In view of the actual condition of the rock at the Government-designated source, it is clear that the Government's representations, as understood by Mr. Spencer, were indeed erroneous. It is beyond dispute that in fact the vast bulk of the rock at that source was wholly unsuitable for use as riprap. Fully 60-70%, at a minimum, of the rock material excavated and handled from the source was unsuitable for use as riprap, being fines and fragments less than 3 inches in size. (App. A24; A25; A54-A55) The Government geologist himself characterized the volume of waste rock actually encountered as "excessive", meaning more than "average or normal." (App. A39; A42)

The Court of Claims, however, did not even acknowledge this unequivocal testimony of Mr. Spencer in its recitation of the "facts" on pages 2-7 of its order (App. A2-A6), or in its discussion of the petitioner's cause of action for misrepresentation on pages 8-9 of its order. (App. A6-A7) Rather, engaging in gross speculation as to the ultimate facts of the case, the court simply pronounces that the approval of the suitability of the rock and the rock source pursuant to Construction Specification 216-8 was intended to relate only to those individual *rock fragments* of acceptable gradation and quality which might later be excavated from the source. Thus, the court states that the Government's approval was "*with respect to the quality and grading of the rock derived therefrom.*" (App. A4) (Emphasis in original.) Such an interpretation flies squarely in the face of the Project Engineer's own testimony that both the Government-designated rock source and the *rock at that deposit were approved by him during the pre-bid worksite tour.* (A27-A28) This was obviously, and indeed had to be, an approval of the suitability of the rock *in situ*, since no riprap at that time even

existed, the gradation of which could have been approved. The interpretation adopted by the Court of Claims as "fact" is thus not only contrary to the testimony of Mr. Spencer, but manifestly illogical. The Government geologist himself testified that the percentage of specification size rock fragments that it is possible to obtain from a quarry for riprap is "primarily related to the *quality of the rock.*" (App. A43) (Emphasis added.)

The Government, which has the burden of demonstrating the absence of a genuine issue as to the interpretation of Construction Specification 216-8, *has never even attempted to respond to this unequivocal testimony of Mr. Spencer and the Government geologist.* Adickes, *supra*, at 157-159, 90 S. Ct. at 1608-1609.

2. The failure of the Government-designated Project rock source to produce the necessary 75,000 tons of rock riprap without excessive waste constituted a separate breach of the implied warranty of suitability of the source. *United States v. Johnson*, 153 F. 2d 846, 847-849 (CA 9 1946). The Court of Claims has recognized that, in designating a particular materials source for a Project, the Government impliedly represents that the necessary materials can be obtained from that source on a reasonably economical basis. *Tobin Quarries, Inc. v. United States*, 114 Ct. Cl. 286, 333, 84 F. Supp. 1021, 1022 (1949). Contrary to the Court of Claims' conclusion of "fact" that there was no "designated" rock source (App. A3; A6; A7; A10; A12), the evidence fully supports the reasonable inference and conclusion that the Lackner quarry was indeed the "contractually designated" Project rock source.

Construction Specification 216-8 at Section 2 "MATERIALS" expressly provides that "Rock from the designated sources, or from other sources approved by the Engineer shall be excavated, selected, and handled. . ." (App. A19) Clause 2, "Specifications and Drawings" of

the General Provisions provides that "The Contracting Officer [including his authorized representative] shall furnish from time to time such . . . information as he may consider necessary, unless otherwise provided." Pursuant to Clause 2, the Project Engineer provided the necessary *further identification* of the Government-designated rock source, already expressly referred to in Section 2 of Construction Specification 216-8 as the "designated" and "approved" source, by personally identifying its location for the benefit of the prospective bidders during the pre-bid worksite tour. As the Project Engineer most forthrightly testified: "The designated area was approved, yes." (App. A28) (Emphasis added.)⁹

Petitioner's President, Mr. Cy Schulte, further testified:

Q. [By Government counsel]: Schulte, prior to the bidding, what was your understanding about the contractual requirements regarding the source for riprap? A. My understanding was that the material would come from the designated source.

* * *

Q. And what was the designated source? A. Lackner quarry." (App. A34)

At no time did the Project Engineer advise the prospective bidders that the proposed Lackner quarry site was not to be considered the contractually designated Project rock source. (App. A27-A28) Indeed, under questioning from petitioner's Construction Superintendent, he flatly stated "The rock's going to come from the Lackner quarry." (A32-A33) Moreover, the Assistant Contracting Officer

9. The status of the Lackner quarry as both a contractually "designated" and "approved" source is entirely consistent with Construction Specification 216-8—a fact which the Government engineer who prepared the specification does not deny. (App. A56)

who attended the April 4, 1979 pre-bid "worksit" showing expressly identified the Lackner quarry as a part of "the project." (App. A26) The foregoing evidence fully supports the inference and conclusion that the Lackner quarry was indeed the contractually designated Project rock source. Moreover, all such inferences must be viewed in the light *most favorable* to petitioner. *Diebold, supra.*

3. In addition to the misrepresentations discussed in A.1. and A.2., *supra*, the Government also breached its contract with the petitioner by misrepresenting the professional opinion of its own geologist concerning the suitability of the rock at the Government-designated rock source.

The Project Engineer expressly advised the prospective bidders that the Government geologist had investigated the Government-designated rock source, and had determined that it was rock "of quality" and "hard enough for riprap." In fact the geologist had *not* approved the rock, but rather had determined that the risk of an "excessive breakdown of the rock" resulting in an "excessive quantity of undersized materials" existed at that rock source. (App. A20) By "excessive" he meant "more than average or normal." Furthermore, by his Geological Trip Report of November 27, 1978, he expressly advised the Soil Conservation Service to conduct test quarrying at the site, *in addition to* the laboratory tests then being conducted, in order to determine the breakdown characteristics of the rock. (App. A20-A21; A40)¹⁰

10. That the Government engineers relied upon this geological information is clear from the record. (App. A29; A57) Moreover, contrary to the court's recitation of "facts" (App. A4), the Government geologist *expressly* testified that his entire purpose in investigating the source was to determine if it would be a "suitable source" (App. A37); that he was advising the Government engineers as to the economic feasibility of the source (App. A37); and that the risk of excessive waste was indeed "relevant" to the question of the feasibility of the source. (App. A38)

In so representing to the prospective bidders that the Government geologist had determined that the Government-designated rock source was rock "of quality" and "hard enough for riprap," the Government grossly misrepresented the facts. Indeed, the Project Engineer testified:

- Q. [By counsel for petitioner]: What was your understanding of the term "hardness of the rock"?
* * * A. To me hardness is just what it says. The hardness is such that it won't break up in handling.
- Q. Breaking up— A. In smaller pieces." (App. A29)

It was precisely the risk of "an excessive breakdown of the rock" at the Government-designated rock source about which the Government geologist warned the Soil Conservation Service in his geological Trip Report. (App. A20) And it was precisely this problem which was the cause of the enormous quantities of waste rock which petitioner actually encountered at the Government-designated source. (App. A22-A24) The Government's misrepresentation of its geologist's professional opinion constitutes a clearly actionable misrepresentation of fact. Restatement, Contracts, Second §159 and comment d thereto. The Project Engineer's representations concerning the professional opinion of the Government geologist constitute *at the very least*, an actionable misrepresentation by "half-truth." Restatement, Contracts, Second, §159, and comment b thereto. While the petitioner discussed this misrepresentation at length on pages 39-44 of its brief in opposition to the Government's motion for summary judgment, the Court of Claims avoided even addressing it in its order of summary judgment. (App. A6-A7)

B. Equitable Adjustment Under the Differing Site Conditions Clause

The Government-designated rock source was the designated and approved Project rock source referred to in Construction Specification 216-8. (See discussion in Part II.A.2., *supra*.) Moreover, Construction Specification 216-8 expressly required the contractor to excavate, select and handle the necessary 75,000 tons of rock from the Government-designated rock source. (App. A19) Under *Stock & Grove, Inc. v. United States*, 204 Ct. Cl. 103, 110, 493 F. 2d 629, 632 (1974) (cited by the Court of Claims on page 15 of its order (App. A12)), the Government is therefore contractually responsible under the Differing Site Conditions clause for that designated rock source. And see *Kaiser Industries Corp. v. United States*, 169 Ct. Cl. 310, 323, 340 F. 2d 322, 329 (1965).¹¹

The Government further confirmed that the Government-designated rock source was fully intended to be "at the site" within the intended meaning of the Differing Site Conditions clause by including it as a central and integral part of the pre-bid Project "worksight" tour. Pursuant to the special "INSPECTION OF WORKSITE" provision contained in the Invitation for Bids, the Project Engineer conducted a "worksight" showing of the Project on April 4, 1979. (App. A16) The Project Engineer testified, and petitioner's Construction Superintendent fur-

11. The contention that some rock source other than the Government-designated rock source may have existed as a possible alternative does not relieve the Government of its contractual responsibility for the Project rock source which the Government designated under the contract. *Stock & Grove, supra*, at 110, 310 F.2d at 632. In fact, no other feasible and suitable rock sources did exist. (App. A35) Indeed, the Project Engineer flatly stated that "The rock's going to come from the Lackner quarry." (App. A32-A33) The Grand Reef Mine, alluded to by the court in footnote 6 on page 12 of its order (App. A10), was inaccessible to construction vehicles (App. A49), and was never even considered by the Government as a suitable alternative. (App. A41; A56-A57)

ther confirmed, that the Project "worksit" tour included a showing of both the various rock placement sites and the Government-designated rock source. (App. A27; A30-A33) The Assistant Contracting Officer also testified that the pre-bid showing of the Government-designated rock source was included as an integral part of the Project worksite tour:

"I attended the site showing of the Aravaipa Project on April 4, 1978 conducted by Mr. Bobby Kilcrease. I accompanied Mr. Kilcrease and the group of potential bidders *on a tour of the project, including a visit to a rock source on the Lackner property.*" (App. A26) (Emphasis added.)

At no time did Mr. Kilcrease advise the prospective bidders that the Government-designated rock source was not to be considered a part of the Project "worksit." (App. A27-A28).

The Court of Claims failed to even include a reference to the Inspection of Worksite provision in its recitation of the "facts" of the case, or to acknowledge that the Government-designated rock source was included as an integral part of the Project worksite tour, *by the Government's own admission.* And the Government, which has the burden of demonstrating the absence of any genuine issue of fact as to the intended scope of the Differing Site Conditions clause, *did not even attempt to respond to these facts.* *Adickes, supra*, at 157-159, 90 S. Ct. at 1608-1609.¹²

12. Openly acknowledging its assumed role of ultimate fact-finder, the Court of Claims declared on page 15 of its order that the Government-designated rock source "was by no means as close to the contract as the quarries in the cited cases." (App. A12) (Emphasis added.) This gross conclusion of fact not only completely disregards the evidence firmly establishing that the Government-designated rock source was the contractually designated and approved rock source, but totally ignores the fact that the Government-designated rock source was expressly made,

(Continued on following page)

Moreover, the excavation, selection and handling of the rock from the Government-designated rock source constituted the major item of mandatory subsurface contract work. As such, that contract work was obviously "at the site", since the Differing Site Conditions clause expressly applies to "physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract." (App. A17-A18) (Emphasis added.) As the Court of Claims observed in *Kaiser Industries Corp.*, *supra*,

"The very heart of this undertaking was the obtaining of suitable rock in a reasonably economical manner from a satisfactory quarry. It would be illogical to conclude that Article 4, specifically addressed to subsurface conditions, was inapplicable to the only part of the Project that involved such operations." *Id.* at 323, 340 F. 2d at 329. (Emphasis added.)

The Assistant Contracting Officer expressly characterized the Government-designated rock source as an integral part of the "project" in his testimony concerning the pre-bid worksite tour.¹⁸

Footnote continued—

and acknowledged to be, an integral part of the Project "worksite," a crucial fact not even present in the cases cited by the court on pages 12-15 of its order. (App. A10-A12)

13. That the Lackner quarry operation was contractually intended to be an integral part of the Project contract "work", and therefore within the scope of Article 4, is further confirmed by the fact that the Government assigned the Project Construction Inspector to spend at least 50% of his time inspecting the quarry operations. (App. A54) Indeed, his daily Construction Log Book contains detailed reports of the quarry operation, noting specifically the daily status of the quarry "Work Force," including men and equipment. (App. A25) These actions are clearly indicative of the Government's contractual intent. *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118, 33 S. Ct. 967, 972 (1912). The court completely disregards these facts in its recitation of the "facts." (App. A2-A6)

Finally, the court makes reference to Paragraph 2(a) "MATERIALS" of the form set of Special Provisions, which provides "Unless otherwise specified in this contract the Contractor shall furnish all materials required for completion of the contract." (App. A3) This clause does not even purport to refer to the Government's express contractual responsibility for the differing site conditions at the Government-designated rock source. As the Supreme Court stated in *United States v. Spearin*, 248 U.S. 132, 137, 39 S. Ct. 59, 61 (1918) such provisions "concerning contractor's responsibility cannot be construed as abridging rights *arising under specific provisions of the contract.*" (Emphasis added.)¹⁴ In addition, under the rule of *United States v. Seckinger*, 397 U.S. 203, 210, 90 S. Ct. 880, 884 (1970), Special Provision 2(a) must "be construed most strongly against the drafter, which in this case was the United States." The Court of Claims, in its order of summary judgment, never even addressed these fundamental rules of contract interpretation as they apply to Special Provision 2(a). And the Government, which has the burden of demonstrating the absence of any genuine issue as to the interpretation of these provisions, has never attempted to even show how Special Provision 2(a) was intended to deprive the mandatory Differing Site Conditions clause of its normal application to the Government-designated rock source. *Adickes*,

14. The Court of Claims itself has repeatedly held that "clauses to whittle down or cut back the Changed Conditions clause, which is prescribed for Government contracts, are not broadly or sympathetically interpreted. *Morrison-Knudson Co. v. United States*, 184 Ct. Cl. 661, 685-86, 397 F. 2d 826, 829, 841-42 (1968)." *Stock & Grove, Inc. v. United States*, 204 Ct. Cl. 103, 110, 493 F. 2d 629, 632 (1974). Thus, in *Kaiser Industries Corp. v. United States*, 169 Ct. Cl. 310, 323-324, 340 F. 2d 322, 329 (1965) the court found that "[d]efendant's attempt to divest itself of all contract responsibility with respect to these sub-surface quarry conditions . . . cannot, in view of the retention of Article 4 in the contract, be sustained."

supra, at 157-159, 90 S. Ct. at 1608-1609. Moreover, as stated in *Fitzsimmons v. Best*, *supra*, at 694 "The interpretation of a contract the terms of which are disputed, is very much a matter of the intent of the parties who entered into the contract. Questions of intent are particularly inappropriate for summary judgment." In such circumstances, "[the court is] required to resolve all ambiguities and disagreements in favor of the party against whom summary judgment is sought, see *United States v. Diebold, Inc.*, *supra*, 369 U.S. at 655, 82 S. Ct. 993." *Heyman v. Commerce and Industry Co.*, 524 F. 2d 1317, 1321 (CA 2 1975).

C. Breach of Contract by Non-Disclosure of Superior Knowledge

The court's pronouncement that "the parties' knowledge was based upon data equally available to both" constitutes gross speculation as to the ultimate facts of this case. *Fortner Enterprises, Inc. v. United States Steel*, *supra*. (App. A9) Contrary to the court's assertion on page 10 of its order (App. A8), that Mr. Spencer was "aware of the potential significance of the extensive jointing and fissuring of the rock," Mr. Spencer expressly testified that he did *not* consider the joints and fractures which he observed to be "extensive" with respect to their spacing. (App. A53)¹⁵ Specifically, he testified that the distance between the joints and fractures which he observed ranged at intervals of from 2 to 3 inches, at the closest, up to several feet, and that he did *not* consider

15. The specifications provided that the rock riprap was to be generally uniformly graded from 3 inches up to 18 inches, with an allowance for 5% under 3 inches. The problem with the excessive waste resulted from the fact that the material from the Government-designated rock source was breaking down to produce fines and fragments, 60-70% of which were smaller than 3 inches in size. (App. A24; A30)

them to pose any problem with respect to rock breakdown. (App. A53) Moreover, he considered the rock to be only slightly to moderately weathered, and "very minor" in extent. (App. A52) All told, on the basis of his April 9, 1979, pre-bid site inspection of the exposed rock outcroppings at the Government-designated rock source (no subsurface rock was exposed, since the rock source had never previously been worked), Mr. Spencer testified that "the rock source appeared to me to be competent, suitable for the use intended and we had been informed that it was an approved source and the rock in the source had been approved, which indicated to me that the construction losses would certainly be within normal amounts, ratios." (App. A50)

By contrast, Mr. Sanders, the Government's geologist, testified that on the basis of his November, 1978 geological investigation of the Government-designated rock source, he had determined that the jointing and fracturing which he observed was "a result of the structural history of the area; the movement of the rock masses probably related to faulting"; and that it was therefore to be expected that the subsurface bedrock would be weathered along such fracture zones. (App. A39; A42)¹⁶ He subsequently reported, in his July 23, 1979 geological Trip Report, that "[t]he problems with obtaining a high percentage of useable rock result from the high degree of fracturing, fault-

16. Mr. Sanders is an experienced Government geologist. (App. A35; A36; A44-A45) Mr. Spencer, petitioner's Construction Manager, by contrast is a civil engineer. (App. A45) The Government engineers, who designed this Project, considered Mr. Sanders' geological advice and assistance essential to their planning of the Project, and specifically relied upon his geological "knowledge, experience and expertise" in conducting the Government's evaluation of the Government-designated rock source. (App. A29; A35; A57) Prior to his on-site investigation of the Lackner quarry on November 17, 1978, the Government geologist consulted a geological map of the area, and a geological publication maintained at his office in order to determine the geological history and rock structure of the Project area. (App. A37; A44)

ing and weathering associated with these features: It is extremely difficult to establish a blasting pattern to yield a greater percentage of useable material due to the bed-rock." (App. A22-A23) He further *expressly* testified that he was not surprised by the excessive waste, and that indeed *he expected such excessive waste to be encountered.* (App. A42)¹⁷ The foregoing evidence clearly and convincingly supports the inference and conclusion that the Government was indeed possessed of superior knowledge concerning the subsurface geological conditions at the Government-designated rock source.

Moreover, as discussed in Part II.A., *supra*, the Government's designation and approval of the Lackner quarry as the Project rock source constituted a representation and warranty that the material at the source was suitable for the use intended. This was the understanding of petitioner's Construction Manager, and nothing in his pre-bid inspection of the source led him to believe otherwise. The law is well-settled that prospective bidders are not required to conduct extensive and costly subsurface exploratory investigations, such as test quarrying, in order to verify such representations and warranties. *United States v. Spearin, supra*, at 135-137, 39 S. Ct. at 61; *Hollerbach v. United States*, 233 U.S. 165, 172, 34 S. Ct. 553, 556 (1914). The record in this case fully supports the conclusion that the prospective bidders should not reasonably have been expected to test quarry the Government-designated rock source. The Government had over 3 months, between its geological investigation in November, 1978 and the issuance of the Invitation for Bids on March 16, 1979, within which to perform the recommended test quarrying. The Government engineer who made the

17. Compare with the court's footnote 5 on page 10 of its order (App. A8), asserting there was no evidence that the Government geologist knew that the excessive waste would be encountered.

decision not to test quarry testified that his decision may have been based on "a time limitation." (App. A56) The prospective bidders had one week from the April 4, 1979 worksite showing of the Government-designated source to the April 11, 1979 bid opening within which to prepare a bid for the Project.¹⁸ Contrary to the court's apparent conclusion that "more conclusive data was available" in the form of test quarrying (App. A9), the facts of the case clearly support the reasonable inference and conclusion that such "data" was most certainly not available in the time allowed by the Government for the preparation and submission of bids.

CONCLUSION

The summary judgment rule prescribed by the Court of Claims in this case is in direct conflict with the rule announced by the Supreme Court in *United States v. Diebold, Inc., supra*. In issuing an order of summary judgment in this complex case, in the face of conflicting inferences and conclusions of fact, the Court of Claims has violated petitioner's fundamental statutory right to trial *de novo*. Petitioner respectfully prays that the Court grant its Petition For Writ of Certiorari, and that it vacate the Court of Claims' order of summary judgment and remand this case to the United States Claims Court for trial in accordance with 41 U.S.C. §609(a).

BERNARD M. JUNG

18. In similar circumstances, the Court of Claims found in *Foster Construction C.A. v. United States*, 193 Ct. Cl. 587, 616, 435 F. 2d 873, 888-889 (1970), that "[t]he duty of the bidders to investigate the site did not require them to conduct geological or other technical investigations, costly and perhaps impossible in the 20 days available."

IN THE UNITED STATES COURT OF CLAIMS
No. 571-80C

L. G. EVERIST, INC., d/b/a CONNOLLY-
PACIFIC CO.

v.

THE UNITED STATES

Contracts; misrepresentation; superior knowledge;
equitable adjustment

Bernard M. Jung, attorney of record, for plaintiff.

Sandra P. Spooner, with whom was Assistant Attorney
General J. Paul McGrath, for defendant.

Before FRIEDMAN, Chief Judge, NICHOLS and
SMITH, Judges.

ORDER

(Filed September 24, 1982)

Plaintiff in this case seeks direct access review of a contracting officer's decision under the provisions of the Contract Disputes Act of 1978. The case is before us on defendant's motion for summary judgment. Plaintiff opposes the motion on the grounds that genuine issues of material fact remain and that defendant is not entitled to judgment as a matter of law. We grant defendant's motion for summary judgment.

As is usual in this kind of case, plaintiff seeks relief both off and on the contract. Off the contract, plaintiff alleges that defendant has breached the contract on two theories. First, plaintiff claims that the Government fraudulently misrepresented the quantity of acceptable rock in a quarry that the Government had approved as a source for rock for the project herein. Second, plaintiff claims that the Government had superior knowledge of the quantity of acceptable rock, which it had a duty to disclose to plaintiff but did not. On the contract, plaintiff claims entitlement to an equitable adjustment based on the Differing Site Conditions clause of the contract for the unexpectedly small quantity of acceptable rock in the quarry. We will discuss these three issues in the foregoing order.

Before reciting the facts, we note our conclusion that there are no genuine issues of material fact in the record which would, in themselves, preclude summary judgment. While the inferences and conclusions drawn from the facts by the parties differ radically at times, the underlying material facts are not in genuine dispute.

In early 1978, the Soil Conservation Service (SCS) of the Department of Agriculture began planning the construction of emergency streambank restoration on the Aravaipa Creek in Arizona. As set out in the invitation for bids (IFB), the contract, and the specifications, the basic design of this project involved a compacted earth fill core, with rock facing—called “riprap”—to prevent erosion. The specification for the riprap¹ read, in pertinent part:

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1. The Government used Specification No. 216-8—Rock Riprap, instead of the more rigorous Nos. 61—Loose Rock Riprap and 523—Rock for Riprap, because this project was designated an emergency project pursuant to 7 C.F.R. §§ 624.1-624.9 (1982). Of course, only the provisions of Specification No. 216-8 are relevant here.

2. MATERIALS

Individual rock fragments shall be dense, sound and free from cracks, seams and other defects conducive to accelerated weathering. The rock fragments shall be angular to subrounded in shape. The least dimension of each individual rock fragment shall be not less than one-third the greatest dimension of the fragment.

Rock from the designated sources, or from other sources approved by the Engineer[,] shall be excavated, selected, and handled as necessary to meet the grading requirements in Section 8 of the specification or on the drawing. * * *

The specification addresses the characteristics of riprap. First, it describes the quality of the rock itself. This aspect of riprap is discussed at some length in the SCS National Engineering Handbook, cited by plaintiff, where the "quality" of rock is described as its soundness and durability. Second, the specification describes the size, or grading, of the rock used for riprap. The approval requirement in section 8—"The suitability of the rock for riprap shall be approved by the Engineer * * *"—refers to these characteristics.

Besides its characteristics, the other issue concerning the riprap is its source. There are only two references to source in the contract. The first is Special Provision 2(a):

Unless otherwise specified in this contract the Contractor shall furnish all materials required for the completion of the contract.

The second is in the specification, quoted above: "the designated sources, or * * * other sources approved by the Engineer." In the absence of any other contract provisions relating to source, we must conclude that there is no "designated source" of rock, that the contractor is

free to find and use any source, that it is the contractor's duty to find a source, and that the source chosen by the contractor is to be approved by the Government *with respect to the quality and grading of the rock derived therefrom.*

On November 17, 1978, as part of the preparation for the project, Aubrey C. Sanders, Jr., an experienced Government geologist, made a field trip to one potential local source of riprap, the Lackner quarry, for the purpose of determining whether there was any local source of riprap. Unless *some* source existed, regardless of its commercial attractiveness, the project could not be undertaken at all. The Lackner quarry was close to the project site, but it was neither owned, operated, nor used by the Government.

Mr. Sanders stayed at the quarry for about one and a half hours and produced a report (dated November 27, 1978) in which he stated that the rock was of sufficient quality but expressed some reservations about the particular source. Noting that the rock was extensively fissured and jointed, he was concerned that there could be "some problem relative to excessive breakdown of the rock, thereby yielding an excessive quantity of undersized materials." He concluded that, all told, the quarry would provide a sufficient quantity of rock of the appropriate grading, but he cautioned that "a determination to use this source should be contingent upon the results of * * * test quarrying to evaluate the breakdown characteristics of the rock."² The report was not made available to prospective bidders.

2. Mr. Sanders also recommended laboratory tests, but it is clear that such tests related solely to the quality of the rock. These tests were conducted with satisfactory results.

The Government did not conduct any test quarrying because, from its point of view, the purpose of the preparatory work was only to ensure that a source of riprap existed, not necessarily an economical source.

On March 16, 1979, the IFB was issued. It contained the contract provisions discussed above and announced that tours of the site would be conducted. Pursuant to this notice, an employee of plaintiff, L. G. Everist, who was not a geologist, participated in a site tour on April 4, 1979, led by Bob Kilcrease, the SCS Area Engineer. Mr. Everist (along with others) was taken to the construction site and then to the Lackner quarry. Mr. Kilcrease told the group that the Lackner quarry was an approved source. According to his testimony, Mr. Everist took this to mean that there was a sufficient quantity of rock of adequate quality to satisfy the requirements of the contract. Mr. Kilcrease also made it clear that the Government did not own the quarry and that bidders would have to strike their own bargain with Lackner. Mr. Everist left the tour with the impression that the Government expected that the Lackner quarry would be used because of its proximity, but that bidders were free to use another quarry, so long as its rock was approved.

A few days later, on April 9, 1979, Mr. Everist again toured the quarry, this time with George Spencer, another employee of plaintiff. Mr. Spencer was not a geologist but he had had 30 years of experience in evaluating potential quarry sites for plaintiff. Mr. Spencer flew over Lackner and another potential local source, the Grand Reef Mine, and he toured Lackner on foot. He was aware that Lackner was approved for quality and understood that his task was to decide whether it was also economical. From the record it is clear that Mr. Spencer made virtually the same observations as Mr. Sanders did, but Mr. Spencer conducted no laboratory tests and did not consider test quarrying due to the small size of the project. He concluded that the Lackner quarry should be used and recommended it to his superior.

Plaintiff submitted its bid on April 11, 1979, and was awarded the contract on May 2, 1979. The contract, as stated in the IFB, contained a Differing Site Conditions clause; it required approval of any choice of rock; it neither designated nor mentioned any quarry; and it required the contractor to be responsible for supplying the materials for construction.

Shortly after commencing quarrying operations, the tendency of the Lackner rock to break excessively into small pieces became apparent. The waste rate was running at about 50 percent, far higher than expected. There is no dispute that the high waste rate slowed production and increased costs to plaintiff. There is also no dispute that an adequate quantity of riprap was eventually obtained from the Lackner quarry.³ The contracting officer denied plaintiff relief in a decision of September 11, 1980, and plaintiff promptly filed its petition in this court on October 21, 1980.

We first consider plaintiff's two breach of contract claims—(1) misrepresentation and (2) superior knowledge—and then consider (3) the equitable adjustment claim.

1. Plaintiff's claim of misrepresentation is founded upon the contrast it draws between Mr. Sander's reservations about the breakdown size of the rock in the Lackner quarry and the statements of Mr. Kilcrease that the quarry was an approved source of rock. The obvious difficulty with this theory is the distinction, clearly drawn by the contract, the specifications, Mr. Sanders, and Mr. Kilcrease—and clearly understood by Messrs. Everist and Spencer—

3. The quarry consisted of two steep slopes facing each other across a creek. The primary location was the northern slope; however, Mr. Sanders noted in his first report that the southern slope could be used if inadequate quantities were found at the primary slope. Plaintiff did have to resort to the southern slope.

between the required physical characteristics of the riprap (quality and grading) and the commercial requirements for the source of the riprap. The short of the matter is that Mr. Sanders expressed some hesitancy about the amount of waste that might be involved, but Mr. Kilcrease made no representations in that respect at all.⁴ Mr. Kilcrease said, and was only understood to say, that the quality of rock was approved and that an adequate quantity of it was available at Lackner. Plaintiff has alleged no facts which would indicate that Mr. Kilcrease suggested in any way what the cost of the quarrying would be.

Nor should we expect that such representations were made. Bidders were encouraged to visit the project site and to note sources of materials, and part of the calculation of the bid price must have been the estimated cost of acquiring the required amount of riprap from whatever source and by whatever means chosen. This was the whole point of Mr. Spencer's visit to the area. He visited the Lackner quarry and the Grand Reef Mine and flew over the whole area for the purpose of recommending the most commercially attractive quarry. Having been told only that the Government approved the Lackner rock for quality and quantity, he chose Lackner as the most economical.

Plaintiff's claim of misrepresentation must fail because the Government made no erroneous representation material to the problem—excessive waste—upon which plaintiff bases its suit, nor did plaintiff's representatives understand that any such representation was made.

4. It is instructive to compare this case with *Tebin Quarries, Inc. v. United States*, 114 Ct. Cl. 286, 333, 84 F. Supp. 1021, 1022 (1949). There the court found that a misrepresentation, albeit innocent, had occurred because in designating in the contract a particular site for the quarry the Government implicitly represented that it was economical. Here, by contrast, no designation was made.

2. Plaintiff's superior knowledge claim must also fail on the threshold issue: we cannot find from the record or from plaintiff's factual allegations that the Government had superior knowledge not reasonably available to plaintiff. Rather than entering into a detailed discussion of the factors set out in *Helene Curtis Industries v. United States*, 160 Ct. Cl. 437, 443-44, 312 F.2d 774, 778 (1963), and *H. N. Bailey & Assocs. v. United States*, 196 Ct. Cl. 156, 177-78, 449 F.2d 376, 382-83 (1971), in this case we are presented with a straightforward comparison of available information.

Mr. Spencer, while not a trained geologist, had a great deal of experience in precisely the task before him. His testimony and his longevity in his post demonstrate that he was qualified for the task. Both he and Mr. Sanders inspected the quarry on foot; Mr. Spencer also examined it from the air. The observations of the two were nearly identical and both were aware of the potential significance of the extensive jointing and fissuring of the rock. Mr. Spencer testified:

Q: [by Government counsel] Did you consider whether these natural joints and fractures might cause [exc]essive breakage when the placing was done?

* * *

A: I decided they would not. [Emphasis supplied.]

The only real difference between their reports was their conclusions,⁵ and then only in that Mr. Sanders was

5. Plaintiff makes much of Mr. Sanders' statement, upon a return visit to Lackner after plaintiff began to experience difficulties, that "[t]he degree of breakdown, however, is not unexpected as indicated by my trip report dated November 27, 1978." (Emphasis supplied.) The post hoc double negative cannot be relied upon as evidence that Mr. Sanders knew that there would be a high degree of breakdown. Indeed, his earlier suggestion of test quarrying shows that he was in doubt prior to the bidding.

inclined to be cautious about the breakage rate and Mr. Spencer was not. While Mr. Sanders would have test quarried before using Lackner, Mr. Spencer, who was actually deciding whether to use it, testified:

Q: [by Government counsel] Did you consider doing some test quarrying?

A: No, ma'am.

* * *

Not on a job this size.

Q: Because it is too small?

A: That is correct.

We conclude that the parties' knowledge was based upon data equally available to both and that, while more conclusive data was available, neither party chose to obtain it. In these circumstances, there is no duty imposed upon the Government to disclose its information to plaintiff. *T. F. Scholes, Inc. v. United States*, 174 Ct. Cl. 1215, 1226, 357 F.2d 963, 970 (1966).

3. Finally, plaintiff's claim on the contract for an equitable adjustment under the Differing Site Conditions clause must fail because the excessive waste spoilage at the Lackner quarry was not a site condition to which the clause applied. The Differing Site Conditions clause reads, in pertinent part:

(a) The Contractor shall promptly * * * notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.
* * * [Emphasis supplied.]

Our discussion of the terms of the contract should amply demonstrate that the Lackner quarry was not "the site" within the meaning of the contract. The Lackner quarry was not designated or even mentioned by the contract; furthermore, the contract made plaintiff solely responsible for the acquisition of riprap. The Lackner quarry was "at the site" only in the sense that plaintiff used it, not within the contemplation of the contract.*

This does not entirely conclude our inquiry, however, for this court has consistently given the Differing Site Conditions clause a broad scope to effectuate it fully. *Kaiser Industries Corp. v. United States*, 169 Ct. Cl. 310, 323-24, 340 F.2d 322, 329-30 (1965); *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661, 666, 397 F.2d 826, 829 (1968); *Stock & Grove, Inc. v. United States*, 204 Ct. Cl. 103, 134-35, 493 F.2d 629, 646 (1974). Plaintiff argues, based on the *Kaiser* doctrine that the Government cannot disclaim all responsibility for conditions which, while nominally not covered by the contract's terms, are necessarily part of the contractor's performance. *Kaiser Industries*, 169 Ct. Cl. at 323-24, 340 F.2d at 329-30. Stated thus, *Kaiser* states a doctrine which we wholeheartedly endorse. On the other hand, it should not be expanded to subvert the meaning of the contract.

The question for us is whether the use of the Lackner quarry was necessarily so bound up with the contractor's performance that the Government should be responsible for the conditions at the quarry. Examining the cases, we

6. To test the validity of this proposition, one might consider the consequences of plaintiff's choosing the Grand Reef Mine instead of the Lackner quarry. Not one word of the contract or specifications would have changed, yet surely it is clear that if plaintiff had chosen Grand Reef, all other facts remaining the same, plaintiff would have no action against the Government. It only remains to be noted that plaintiff clearly considered such an action in visiting Grand Reef Mine and in making an aerial survey of the entire area.

find two particularly significant factors: the first and most important is the extent to which the contract (and accompanying drawings or specifications) or circumstances anticipate the use of a particular quarry; the second is the size of the difference between anticipated or represented conditions and the actual conditions.

In *Tobin Quarries, Inc. v. United States*, 114 Ct. Cl. 286, 84 F. Supp. 1021 (1949), the contract required the contractor to quarry its rock Moose Creek Butte, which the Government represented to be "a solid rock formation." *Id.* at 331-32, 84 F. Supp. at 1021. In that case, however, there was an extreme amount of waste, stated by the contractor to be 10 to 1 and 3 to 1, waste to suitable rock, in various locations. *Id.* at 301, 304, 332, 84 F. Supp. at 1021-22.

The facts in *Kaiser* were more extreme, which may account for its broadly worded holding. In that case, the Government owned two local quarries which, after years of investigation, it had found to be the only ones in the area. *Kaiser Industries*, 169 Ct. Cl. at 314, 340 F.2d at 324. The contract itself stated that the quarries were "approved"—the Government had conducted extensive investigation of the quarries—and could be used without charge. *Id.* at 314, 321-22, 340 F.2d at 324, 328-29. Indeed, the way the bidding was set up, the Government in effect allocated a particular quarry to the contractor. *Id.* at 319, 340 F.2d at 327. The quarry first used was "not a commercially operable one at all." It yielded 60 percent waste and was exhausted of all usable material long before producing the amount required by the contract. *Id.* at 314-15, 340 F.2d at 324-25.

Morrison-Knudsen also differs significantly from the instant case. That contract not only designated borrow pits, but it and the 98 accompanying drawings described their location, section, relation to the project, and capacity

in great detail. *Morrison-Knudsen*, 184 Ct. Cl. at 672-73, 397 F.2d at 833. The proposal also included for the bidders' perusal field studies and material studies of the pits. *Id.* at 672, 397 F.2d at 833. As in *Kaiser*, the pits failed even to supply the quantity of material required by the contract—contrary to express representations—and all of the material from some of them was rejected by the Government for its low quality. *Id.* at 674, 379 F.2d at 834.

Finally, in *Stock & Grove*, the court was again presented with a contract that designated a specific site as the quarry and required the contractor to quarry there. *Stock & Grove*, 204 Ct. Cl. at 107, 110, 493 F.2d at 630, 632. And despite the Government's implicit representations of quantity and quality, *id.* at 107-08, 493 F.2d at 630, the contractor could not complete the contract without more material from a new quarry and relaxed quality requirements. *Id.*

Without again rehearsing the facts of the instant case it should be apparent that the Lackner quarry was by no means as close to the present contract as the quarries in the cited cases. Neither the contract here, nor any of its attachments, made any reference to Lackner and, as represented, Lackner supplied a fully sufficient quantity and quality of rock for the project. It supplied the rock at a higher cost than anticipated, but, in the circumstances, that one fact cannot bring this case within the ambit of the *Kaiser* doctrine.

IT IS THEREFORE ORDERED, after thorough consideration of the parties' submissions and without oral argument, that defendant's motion for summary judgment is granted and the petition is dismissed.

BY THE COURT

/s/ Edward S. Smith
Edward S. Smith
Judge

SEP 24 1982

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 571-80C

L. G. EVERIST, INC.,
d/b/a CONNOLLY-PACIFIC CO.,
Appellant,

v.

THE UNITED STATES,
Appellee.

ORDER

A suggestion for rehearing en banc and a petition for reconsideration having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby, Denied.

FOR THE COURT:

/s/ George E. Hutchinson
Clerk

December 13, 1982

Date

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

717 Madison Place, N.W.
Washington, D.C. 20439

Date November 9, 1982

APPEAL NO. 571-80C, L.G. Everist, Inc. d/b/a Connolly-Pacific Co. v. The United States

The following has been received and filed this date:
October 8, 1982.

- () Appendix/Brief (NOTE: Appellee's Brief due 40 days from the date of service)

() Brief for Appellee

() Brief for Amicus Curiae

() Reply Brief

(X) Petition for Rehearing & Rehearing and Suggestions for Rehearing In Banc

()

**George E. Hutchinson, Clerk
/s/ Elizabeth J. Carroll
By Elizabeth J. Carroll
Deputy Clerk**

INVITATION FOR BIDS

(CONSTRUCTION CONTRACT)

INVITATION NO.
SCS-11-AZ-79

DATE
March 16, 1979

NAME AND LOCATION OF PROJECT DEPARTMENT OR AGENCY

Aravaipa Creek	U. S. Department of
Emergency	Agriculture
Watershed Project	Soil Conservation
Graham County, Arizona	Service

BY (issuing office)

Soil Conservation Service
Room 3008 - Federal Bldg.
230 N. First Ave.
Phoenix, AZ 85025

Sealed bids in single copy for the work described herein will be received until 1:00 p.m. local time at the place of bid opening April 11, 1979 at Room 3008 - Federal Building, 230 N. 1st Ave., Phoenix, Arizona 85025 and at that time publicly opened.

Information regarding bidding material, bid guarantee, and bonds

* * *

The following attachments hereto form a part of this invitation for bids and any resultant contract: Bid Schedule, Special Provisions, General Provisions-Standard Form

23-A, Labor Standard Provisions - Standard Form 19-A, Instructions to Contractors Form AD-425b, Disabled Veterans of the Vietnam Era - AD-716, Employment of the Handicapped - Form AD-655, and Specifications and Drawings listed under "Contents".

Description of work Construction of emergency stream bank restoration including compacted earth fill and rock riprap. The work will be commenced within ten (10) calendar days and completed within 150 calendar days after date of receipt of notice to proceed.

INSPECTION OF WORKSITE - Prospective bidders may assemble at the Post Office, Klondike, Arizona on Wednesday March 29, 1979 and Wednesday April 4, 1979 for a group showing of the worksite. The group will leave at 10:00 a.m. on each of the above days. If you are unable to attend one of the group showings, arrangements to inspect the site may be made with Bob Kilcrease, Area Engineer, SCS, 3241 Romero Rd., Tucson, Arizona 85705 (Phone: (602) 792-6602).

BID SCHEDULE

ARAVAIPA CREEK PROJECT EMERGENCY WATERSHED PROTECTION - 216

Bid Item	Work or Material	Spec. No.	Unit	Quantity	Unit Cost	Amount
1	Mobilization	216-1	Job	1		
2	Loose Rock Riprap	216-8	Ton	75,000		

GENERAL PROVISIONS

(Construction Contract)

1. DEFINITIONS

* * *

(b) The term "Contracting Officer" as used herein means the person executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative.

2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

* * *

4. DIFFERING SITE CONDITIONS

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions

at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after the final payment under this contract.

* * *

SOIL CONSERVATION SERVICE
ARIZONA
CONSTRUCTION SPECIFICATION
216-8. ROCK RIPRAP

* * *

2. MATERIALS

Individual rock fragments shall be dense, sound and free from cracks, seams and other defects conducive to accelerated weathering. The rock fragments shall be angular to subrounded in shape. The least dimension of each individual rock fragment shall be not less than one-third the greatest dimension of the fragment.

Rock from the designated sources, or from other sources approved by the Engineer shall be excavated, selected, and handled as necessary to meet the grading requirements in Section 8 of this specification or on the drawing. When filter or bedding material is specified, it shall be selected to meet the grading requirements in Section 8 or on the drawings.

* * *

8. ITEMS OF WORK AND CONSTRUCTION DETAILS
Items of work to be performed in conformance with this specification and the construction details are:

a. *Bid Item 2, Loose Rock Riprap*

- (1) This item shall consist of the furnishing and placing of loose rock riprap, including shaping the slopes and excavating for the toe, as shown on the drawings and as staked in the field.
- (2) The suitability of the rock for riprap shall be approved by the Engineer.

* * *

UNITED STATES DEPARTMENT OF AGRICULTURE
Soil Conservation Service
River Basin-Watershed Planning Staff
Suite 326, Arizona Title Bldg., 111 W. Monroe,
Phoenix, AZ 85003

DATE: November 27, 1978

SUBJECT: MGT - Trip Report - Geologic Assistance
on Aravaipa Creek

TO: T. Niles Glasgow
RBWP Staff Leader

On Friday, November 17th I travelled to Klondyke where I met Bobby Kilcrease, Gene Goostree, a U.S. Forest Service representative and the owner of Fourmile Ranch. The purpose of this trip was to evaluate locally available rock materials for use as riprap in conjunction with channel stabilization work in the area.

The proposed quarry site is located in the SE 1/4 of section 27, Township 7 South, Range 19 East on the south side of Fourmile Creek. The rock is exposed on a steep, north facing slope. This rock was field classified as andesite porphyry. Exposed rock is slightly to moderately weathered at the surface. Weathering effects probably extend to a depth of only a few feet. Fractures and joints cut the rock at intervals ranging from a few inches to several feet. The main limiting factor in using this source would appear to be the extensive jointing and fracturing. This may create some problem relative to excessive breakdown of the rock, thereby yielding an excessive quantity of undersized materials. This problem can only be assessed fully by doing some test quarrying at the site. The rock appears to be of suitable hardness for use as riprap. However, the final determination of this should be based upon the results of the tests currently being performed on

rock samples submitted for laboring testing. This data will be provided when testing is completed.

An alternate site was examined on the north side of the creek about 400 feet west of the primary site. At this site an andesitic basalt dike has intruded the porphyry. This rock is more dense and considerably less fractured than the porphyry. The dike is about 25 to 30 feet in width and raises an estimated 40 feet above the canyon floor. The dike trends in a northwesterly direction. This rock appears to be of superior quality to the porphyry. It is more dense and much less fractured.

The required quantity of riprap has not yet been determined. The alternate site may not yield the required quantity of material from the dike material. However, the adjacent material is porphyry like that at the primary site. It is therefore recommended that the alternate site be used as a riprap source. If the dike material does not yield an adequate quantity of riprap than the adjacent porphyry could be utilized.

The primary site appears to offer useable materials. However, a determination to use this source should be contingent upon the results of the laboratory tests in conjunction with test quarrying to evaluate the breakdown characteristics of the rock.

Aubrey C. Sanders Jr.

November 22, 1978

cc: (w/o att)

Ralph N. Arrington, SCE, Phoenix, AZ
Joseph L. Knisley, Jr., AC, Tucson, AZ
Bobby G. Kilcrease, ABS, Tucson, AZ
Gene R. Goostree, DC, Mesa, AZ

AC SANDERS JR:sls

UNITED STATES DEPARTMENT OF AGRICULTURE
Soil Conservation Service
River Basin-Watershed Planning Staff
Suite 326, Arizona Title Bldg., 111 W. Monroe,
Phoenix, AZ 85003

DATE: July 23, 1979

SUBJECT: MGT - Trip Report - Geologic Assistance on
Aravaipa Creek 216 Project

TO: T. Niles Glasgow
RBWP Staff Leader

On July 17th I travelled to Klondyke where I met Messrs. Bobby Kilcrease and Quenton Isaacson. We were joined by Mr. John Googins, Project Superintendent for the contractor performing 216 work on Aravaipa Creek.

The purpose of this trip was to evaluate the rock riprap being quarried for channel protection. The rock being quarried, in many instances, is breaking down to produce undersized materials. This rock is being removed and disposed of. As a result of this breakdown, more excavation is required to obtain the needed quantities. The degree of breakdown, however, is not unexpected as indicated by my trip report dated November 27, 1978. The material which is being used appears to be of adequate quality.

The problems with obtaining a high percentage of useable rock result from the high degree of fracturing, faulting, and weathering associated with these features. It is extremely difficult to establish a blasting pattern to yield a greater percentage of useable material due to the bedrock. Despite the somewhat low production rate the contractor should be able to obtain adequate quantities of acceptable quality rock from the present site.

In the event that it is deemed necessary or desirable another quarry site could be opened. A potential quarry site which should produce higher quality rock is located nearby as described in my report dated November 27, 1978. There are some problems of accessibility to this site but they could be overcome.

There appears to be a good working relationship between SCS personnel on the job and the Contractors Superintendent.

/s/ Aubrey C. Sanders, Jr.
Aubrey C. Sanders, Jr.
Geologist

Enclosure

cc: Gus Dornbusch, ASTC (WR), Phoenix, AZ
Ralph Arrington, State Conservation Engineer, Phoenix, AZ
Joe Knisley, Area Conservationist, Tucson Area Office
Bobby G. Kilcrease, Area Engineering Specialist,
Tucson Area Office

UNITED STATES DEPARTMENT OF AGRICULTURE
Soil Conservation Service

Tucson Area Office
3241 N. Romero Road
Tucson, Arizona 85705

DATE: August 31, 1979

SUBJECT: AS - Contracts - 50-8A02-9-00068,
Aravaipa 216

TO: B. E. Osterquist, State Administrative Officer,
SCS, Phoenix

Attached is a construction schedule given to me this past week by Connolly-Pacific's Supt. John Googins. Their projected completion date is December 21, 1979. This is approximately 2 months past the contract date.

The quarry has produced a high percent of under 3 inch material. This percentage has averaged 60-70% fines. The result of this larger percentage of under 3 inch material is a much larger handling of parent material in order to produce contract rock. The handling of extra material has slowed the production of contract rock.

The contractor has added a second shift to his quarry operation this week in an attempt to increase production.

There is still a labor problem at the job site. The labor union still has a picket line set up. The operators are currently working but that could change if a hearing set for Sept. 4, 1979 in Tucson goes against Connolly-Pacific.

/s/ Bob Kilcrease
Bob Kilcrease
Government Representative

cc: Ralph Arrington (w/attach)
J. Knisley (w/o attach)
G. Goostree "

PLAINTIFF'S DEPOSITION EXHIBIT 30

(Excerpt from Government Construction Logbook)

Report No. 119

Date 14-Nov-1979

Weather Clear Cool Breeze

* * *

Work Period 0700 to 1630

WORK FORCE

Supt. John Googins	Skilled Laborer
Foreman Bud Greer, Butch Raby	19 2

* * *

NARRATIVE

Rock riprap being hauled to "T" Section. 4 trucks on riprap & 1 on waste - Loader for rock placement taken to pit to work as one of 988's blew a tire. Rock from last nites shot is looking really good - Has a higher % useable rock to waste. Maybe 40% useable to 60% waste. Rock tests on "H" section completed this AM - No word as to any more tests. Jack Stevenson, Portland TSC, Ralph Arrington, Bill Andersen of Arizona State Office & Bob Kilcrease Tucson A.O. were on the job site today - They toured the repair of "W" Section - the work on Rattlesnake Section. They looked at the test sections of "V" "F" "G" & "H" Sections - Talked with Googins & Dennis of Connolly-Pacific about tests & round & square screens - looked at "T" section rock to be placed & the rock pit

* * *

/s/ Bill Cutter C.E.T.

IN THE UNITED STATES COURT OF CLAIMS

No. 571-80C

L. G. EVERIST, INC., d/b/a CONNOLLY-
PACIFIC COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

AFFIDAVIT

1. My name is Frank E. Wilimek. My present position is Assistant State Administrative Officer with the Soil Conservation Service, Phoenix, Arizona.
2. I attended the site showing of the Aravaipa Project on April 4, 1978 conducted by Mr. Bobby Kilcrease. I accompanied Mr. Kilcrease and the group of potential bidders on a tour of the project, including a visit to a rock source on the Lackner property.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 27, 1982.

/s/ Frank E. Wilimek
Frank E. Wilimek

**EXCERPTS FROM THE DEPOSITION OF
BOBBY C. KILCREASE**

[8] Q. Would you identify all of the individuals who represented the government who were present at the April 4, 1979 pre-bid work site tour for the Aravaipa Creek project? A. There was myself and Frank Wilamek.

Q. Did the tour commence as scheduled at 10:00 a.m. at the Klondyke post office? A. Approximately.

Q. Would you describe the various activities that were undertaken during that tour? A. The tour consisted of me taking the representatives of the contractors to the various sites until they had a feel for what the project was going to be, as far as placing the rock on dikes. Then we made a tour up to this proposed site or—not proposed—but what's the word I want to use?—possible site that they might use for rock. They looked at it and asked some questions and I told them some answers.

* * *

[11] Q. Was this the same source that was described by the geologist as the proposed quarry site? A. Yes.

Q. Do you recall what you precisely told the bidders at the time that you reached the proposed quarry site? A. We went up and down the site and I told them that our geologist had made an investigation of this source, he had made an investigation, he removed samples to run tests on; he said that the rock on that side, which would be the south side, was hard enough for riprap, that on the north side it was not quality rock to use on riprap.

* * *

[12] Q. And you told the bidders that, on the basis of your investigation, the proposed quarry site was to be considered as approved. A. Yes. The rock was approved on that side.

* * *

Q. Did a discussion follow about the north side of Right Prong Creek? A. To the best of my knowledge, no.

Q. But it was not approved. Is that correct? A. That's the best of my knowledge, yes.

* * *

[13] Q. The whole area was approved? Is that correct? A. No, sir.

Q. On the south side of the creek, that is? A. The designated area was approved, yes.

Q. The designated area being what? A. One of the faces of that bank.

Q. Which face was that? A. It was the south face.

* * *

[14] Q. Did you approve the site pursuant to the specifications?

* * *

A. I said the geologist had approved that rock as being of quality.

Q. And the site was approved. A. The site was approved.

Q. That's what you stated. A. Yes.

Q. Was there anything else whatsoever said about that quarry source? A. Not that I really know of.

* * *

[15] Q. Where was the reef? A. It was across the Aravaipa Canyon. I have never been there. I just know approximately where it was.

Q. The geologist had not investigated that. A. No.

Q. Had the geologist investigated any other sources whatsoever? A. No. All we wanted was one source.

Q. How did it come about that that source was chosen as the one to investigate? A. Mr. Lackner volunteered it, and all we wanted was one source. So we

knew that we had a project and could go on with our engineering.

* * *

[19] Q. I'm now going to hand you what's been marked Plaintiff's Exhibit 7, and it's the contracting officer's decision on the claim of Connolly-Pacific Company, which is the subject matter of this litigation, and I'd ask you to review Claim Item No. 1 and the discussion under that.

MS. SPOONER: No questions until I locate a copy, please.

Okay, I have one.

[20] Q. By MR. JUNG: Referring again to those paragraphs under Claim Item No. 1, the first full paragraph, it states:

"All bidders attending pre-bid site showings were informed that the government had determined that the quality of the rock as to hardness, located at the Lackner property, had been determined to be acceptable to the government."

What was your understanding of the term "hardness of the rock"?

* * *

A. To me hardness is just what it says. The hardness is such that it won't break up in handling.

Q. Breaking up— A. In smaller pieces.

* * *

[24] Q. Why did you request geologic assistance in your November 13th memo? A. To see if there was rock available that could be used on the project.

Q. Did you consider the geologic advice and assistance a necessity? A. Yes. It's part of our planning process.

* * *

[33] Q. I'm now going to hand you what's been marked Plaintiff's Exhibit 21, and it's a report dated August 31, 1979, from you to Mr. Osterquist, and I'd ask you to review that. A. Okay.

Q. Do you still agree with all of your findings and observations? A. Yes.

Q. Do you feel anything should have been added to that report which was not included? A. No.

Q. What do you mean by the term "fines"? A. Fines is the material smaller than the minimum size specified.

Q. And in this case, that was three-inch? A. I think three inches, yes.

Q. There was a tolerance, I believe, of five percent under three inch. A. Yes.

* * *

EXCERPTS FROM THE DEPOSITION OF GARLAND EVERIST

[11] Q. I'd like for you to tell me physically what happened on the site showing, the government-sponsored site showing, starting with the first time you contacted a representative of the government or the government representative contacted you. A. A group of contractors met at the Klondyke General [12] General Store. Everybody was logged in. From there everybody went up to a couple of the dikes up on the—it would be the west end of the job? Yeah, west or northwest, or whatever; showed where the dike locations would be; and then we came down, crossed the creek, and went up to the Lackner ranch property.

* * *

[15] Q. Did anyone ask whether there were other possible quarry sites— A. Yes.

* * *

Q. Do you recall who asked? A. A representative from D. C. Speer Construction Company.

Q. What was the question that was asked? A. He asked if Mr. Kilcrease was familiar with the [16] Grand Reef Mines.

Q. What did Mr. Kilcrease say? A. He said he was not familiar and he did not know where they were located, and that if he was interested in that, in the mines, that he could contact some local people who would direct him to where it was at.

Q. Did Mr. Kilcrease offer to take the D. C. Speer representative or other representatives to the Grand Reef Mine? A. No, he did not.

Q. Are you certain about that? A. Yes.

* * *

Q. Was there any other discussion of any other potential [17] quarry site prior to your actual arriving at the Lackner quarry? A. No.

Q. Tell me what happened after you arrived at the quarry. A. When we arrived at the Lackner Ranch everybody got out of their vehicles and into Eddie Lackner's four-wheel-drive pickup, in the back of it, and drove up through the canyon, and Mr. Kilcrease said that the south face was an approved source, or a source of approved rock.

* * *

Q. Did Mr. Kilcrease say anything else about the Lackner quarry except that, as you say, the south face was an approved source? A. He said that the north face was not approved and that the large boulders in the creek running down the center of the canyon would not be available to be used for riprap.

Q. Not available? Or not approved? A. Not approved.

* * *

[18] Q. Do you recall anything else that was said?
A. Well, he said it was Lackner's property, that the contractor who got the job would be paying or making an agreement with the Lackners for royalties. I'm sure there were some other things said, but you have to ask me more specific questions.

* * *

Q. Do you recall whether there was any discussion of any other potential quarry sites during the tour of the quarry? A. There were not.

Q. You're certain about that? A. The reference to the Grand Reef Mine was made at the Lackner Ranch. It was a simple question-and-answer thing. It was never brought up again during the tour.

* * *

[20] Q. Tell me again what he said. A. Okay. At the initial meeting, when he told everybody about the Lackner quarry that was listed in the plans, he said this was the source of rock that the Soil Conservation had found and had decided that approved quality rock could be taken from that quarry site, and that they had looked other places and hadn't been able to find another area, but that if a contractor wanted to go out and try to find another quarry site some other place, they could try, subject to approval.

Q. Did he later change his explanation? A. Later, after the group came back from the quarry, went and looked at a couple of other dike locations toward the center of the job, at that time he said, "All of the dike locations are similar to this." A majority of the contractors' representatives left at that time. I believe one or two of us continued on down toward. I believe it was Area W, and at that time, when we looked at that dike location, after being asked about whether it was designated or approved,

and what the difference was and what was the deal with the Lackner quarry, he said, "The rock's going to [21] come from the Lackner quarry."

* * *

Q. Are those his exact words? A. Those are very close to his exact words.

* * *

[27] Q. In connection with the second time you visited the Lackner quarry—in the company of Mr. Spencer? A. Uh-huh.

Q. —What was the purpose of that visit? A. To show him the quarry so that he could prepare a bid.

Q. What did you tell Mr. Spencer about the quarry? [28] A. I told him, referring to your drawing again, that area number one was the portion of the canyon which the tour and Mr. Kilcrease had said was the source of rock.

Q. Was the source? A. The source of approved rock or the rock was approved. Right there.

* * *

I told him that when we were given the SCS showing that the SCS representatives took us into the canyon and pointed toward area number one, shown on this diagram, the south side of the canyon, and said, "This is where the geologist has said there is sufficient and adequate rock for riprap."

* * *

[29] Q. Did you tell Mr. Spencer that the area marked number one on that map had been approved by the Soil Conservation Service? A. Yes, as an adequate source of rock.

* * *

Q. What did you tell Mr. Spencer about the area marked two on the map? [29A] A. That it was not an approved source.

* * *

**EXCERPTS FROM THE DEPOSITION OF
CY SCHULTE**

[13] Q. Mr. Shulte, the questions I'm going to ask you now have to do with the Aravaipa Creek project, and the first one is, did any Government representative prior to the bidding ever represent to you personally that the contractor on the Aravaipa Creek project would have to obtain rock for riprap solely from the Lackner quarry?

A. No.

[14] Q. To your knowledge, was such a representation made to anyone in Everist or Connolly-Pacific? A. Yes.

Q. To whom? A. To Garland Everist.

* * *

Q. (By MS. SPOONER) Shulte, prior to the bidding, what was your understanding about the contractual requirements regarding the source for riprap? A. My understanding was that the material would come from the designated source.

* * *

Q. And what was the designated source? A. Lackner quarry.

* * *

[28] Q. The map shows two outcroppings, one on the south side of the creek labeled with number one and the other on the north side of the creek labeled with a number two.

* * *

Do you see those, Mr. Shulte? A. Yes.

Q. Do you recognize either of those sites as the site of quarrying by Everist during the performance of the Aravaipa Creek project? [29] A. Yes.

Q. Which one or both? A. Initially one.

Q. And was there also quarrying done in two? A. Yes.

Q. Was there quarrying done in any other site? A. No.

Q. And you are certain about that? A. To the best of my knowledge, yes.

Q. You testified earlier that it is your understanding that a Government representative told Mr. Garland Everist prior to the bidding that the Lackner quarry was the only source from which a contractor could obtain rock riprap for the Aravaipa Creek project, is that right? A. Yes.

Q. Is it your understanding that Mr. Everist was directed to the area marked one or the area marked two or both? A. The area marked one.

Q. How did it come that Everist did quarrying in the area marked two? A. If I recall, they requested permission to go to the area two to try and find some better material.

[30] Q. Did you consider requesting going to some area other than area two? A. No.

Q. Why not? A. No place else to go.

* * *

**EXCERPTS FROM THE DEPOSITION OF
AUBREY C. SANDERS, JR.**

[6] A. Well, I have the responsibility, overall responsibility for all of the geology work, the technical aspects of the geology work in Arizona.

Q. Do you generally become involved in construction projects when there is a geological problem involved? A. I would say that's true, yes.

* * *

[8] Q. Would you describe yourself as an engineering geologist? A. Yes, I would.

Q. What are the special qualifications and training for an engineering geologist? A. Would you repeat that question?

Q. Well, I'll rephrase it.

Does an engineering geologist have certain qualifications or training beyond that generally and normally attained by a geologist? [9] A. Yes.

Q. What are those qualifications and training? A. Well, the training can involve numerous things, but basically, it's training in engineering principles as applied to geology and geology as applied to the engineering profession.

Q. What is the special role that an engineering geologist plays that a regular geologist doesn't in his day-to-day activities? A. I would say that the engineering geologist interprets geological conditions as they relate to engineering type projects, and it is just a specialized area.

Q. Is there any special experience or qualifications that a geologist needs to have to hold himself out as an engineering geologist? A. Yes, yes.

Q. What is the length of your experience as an engineering geologist, in years? A. Well, I would say about fifteen years.

* * *

[14] Q. Were you given an explanation as to what was to be required of you during your field trip? A. Well, of course I was given some indication of the requirements, yes.

Q. What did you understand them to be? A. Basically, I was asked to go down and determine if there was a suitable site available to obtain rock riprap for the Aravaipa project.

Q. Who requested your assistance? A. Can you rephrase that question?

Q. Yes. What individual contacted you to request your assistance? A. To the best of my recollection, it was Niles Glasgow.

Q. Who is Niles Glasgow? A. Niles Glasgow is an assistant state conservationist in Arizona.

* * *

[15] Q. Did you review any particular documents or reference materials prior to your investigation of the proposed source of rock for the Aravaipa Creek project?
A. Yes.

Q. What was that? A. Well, I believe there were two documents that I recall reviewing. One is the geologic map of Graham County; the other one was a published U.S. Geological Survey Report that I cannot recall the title, but it covered that general area of the state.

Q. Where did you obtain access to this U.S.G.S. document? A. The particular one in question?

Q. Yes. [16] A. We have it in our library.

* * *

[31] Q. Okay. Why did you describe this as a proposed quarry site? A. Well, basically, it was the site, the area which I was asked to look at to determine if it would be a suitable source of riprap.

* * *

[33] Q. By MR. JUNG: Would you consider your trip to the proposed quarry site as one to assist the engineers in determining whether this source would provide a feasible source in terms of economic feasibility for the project?

* * *

THE WITNESS: Yes.

* * *

Q. Well, isn't it true that you state in the second major paragraph of your trip report that there is a problem with respect to excessive breakdown of rock? A. No, I don't believe that I read that exactly that way.

Q. I'm referring to the sentence that states as follows:

[34] "This may create some problem relative to excessive breakdown of the rock, thereby yielding an excessive quantity of undersized materials."

Doesn't that relate to the economic feasibility of this rock source for the project? A. It is relevant.

* * *

[49] Q. Did you determine the depth of the joints and fractures? A. No.

Q. Why not? A. I didn't have the equipment. It wasn't the purpose of the investigation to do this. This was a preliminary investigation.

Q. But it was a feasibility investigation, wasn't it?
A. In general terms, yes.

* * *

Q. * * * Was it a concern of yours as to the depth of joints and fractures? A. Yes, I would say that was a concern.

Q. But you were unable to determine whether these were merely surficial joints and fractures or joints and [50] fractures that extended to a depth into the bedrock?
A. It would be assumed that they extended to a depth.

Q. On what would you base that assumption? A. Normally, jointing is not confined or related to the weathering.

Q. So then you're saying you did assume that the joints and fractures extended some depth into the bedrock.
A. I assumed that.

Q. What was the cause of the jointing and fractures that you observed? A. Well, I would assume that the jointing was a result of—could be the result of—well, it is a result of the structural history of the area; the movement, the rock masses probably related to faulting.

Q. You say related to faulting. What faulting was there? A. At the site, at the time that I observed the outcrops, I did not see any evidence of faulting at the site itself, but there is faulting in the area.

* * *

[51] Q. Referring again to the second paragraph, second full paragraph, does your terminology of "excessive breakdown of rock" refer to a quantitative description or a qualitative description, or both? A. I use that terminology in a qualitative way.

* * *

Q. What do you mean, qualitatively, by the word "excessive"? A. I suppose that I meant the breakage would be more than average or normal.

* * *

[57] Q. Did you discuss the necessity of test quarrying the site with Mr. Kilcrease when you conducted your geologic investigation on November 17th, 1978? A. I don't recall that, whether I did or not.

Q. Your best recollection is what? A. Of course, I believe that I did mention to him that it could only be determined by doing some test quarrying, that the yield could only be done by doing some test quarrying.

As I stated in my report, I think that we did talk about that.

Q. And it was your recommendation that it be test quarried.

* * *

I'm referring to the top of page two, the last full sentence, where you state as follows:

"However, a determination to use this source should be contingent upon the results of laboratory tests in conjunction [58] with test quarrying to evaluate the breakdown characteristics of the rock." A. Okay. Are you asking if I recommended that the SCS do test quarrying at the site? Is this the question?

Q. I'm asking if it was your recommendation that, before that source was chosen to be used for the project, that it be test quarried. A. Are you referring to any specific—

Q. I'm referring to use by the quarry by anyone. A. Yes, then yes, right.

Q. So that was your professional recommendation. A. Right.

* * *

[63] Q. How did you determine that those four individuals listed under the cc were to receive copies of this report? A. Well, it's procedural policy in the SCS that certain individuals, depending upon their area of responsibility, will receive copies of such trip reports.

Q. And Mr. Arrington and Mr. Kilcrease were members of the engineering staff.

Is that correct? A. Yes.

Q. And so, as a matter of course, they would receive [64] this report. A. Yes.

Q. And to your knowledge, they did. A. Yes.

* * *

[77] Q. By MR. JUNG: To your knowledge, was any action ever taken as a followup to your recommendation for test quarrying the site, the proposed quarry site? A. I'm not aware of any action along that line.

Q. Other than Mr. Kilcrease, did you discuss the necessity for test quarrying with anyone? A. I don't recall for sure if I did or not. It's possible that I did.

Q. Who would it be, more likely than not, that you did, if in fact you did? A. Probably Ralph Arrington or Bill Andersen, if in fact I did.

* * *

[78] Q. By MR. JUNG: Did you ever discuss or confer with anyone at the SCS concerning sources of rock for the project other than those described in your trip report prior to the issuance of the invitation for bids? A. Yes.

Q. What other sources were there? A. Bob Kilcrease mentioned another source in the Klondyke area, and that was about the extent of our discussion. In fact, he mentioned that there was another possible source.

Q. How did he identify that source? A. I don't recall.

Q. When did he bring that up? A. At the time of my trip report, my first trip report.

Q. Why didn't you then check out that other source? A. Well, we determined that the site that I looked at [79] could provide a source of rock, and it was much nearer, much more accessible, and we were merely trying to ascertain the fact that there was a source available.

So there was no need, really, to check out another site. He didn't know exactly where the site was, either.

Q. So you were never asked then to view a source known as the Reef or Grand Reef Mine? A. No.

* * *

[88] Q. When you visited the site on July 17th, 1979, was the degree of the rock breakdown and the amount of rock waste then being encountered consistent with your expectations based upon your November 27th, 1978 field trip? A. Yes, I think that it was consistent.

Q. So, in other words, the amount of waste then being encountered was the amount you expected to be encountered. A. Relatively speaking, and in general terms, yes, right, I would say so.

* * *

[89] Q. Is that to say you were not surprised by the excessive waste? A. Yes.

* * *

Q. When you say in your 7-23-79 trip report, or where you refer to a high percentage of usable rock, what, [90] quantitatively, do you mean by high percentage of usable rock"? A. * * * I mean basically normal percentage that you would expect from a good selected quarry site. If you were out and selecting the ideal quarry site, you would get a high percentage.

Q. That amount that would normally be encountered in a good, economically feasible commercial riprap quarry? A. * * * I would expect that high percentage of usable rock from a good commercial quarry site.

* * *

[91] Q. You refer in your 7-23-79 trip report to the fact that weathering was associated with certain features.

Why was weathering associated with the features described in that trip report?

* * *

[92] A. Well, to some degree the weathering was associated with fracturing and faulting, and it's normal for weathering to progress along fracture zones.

Q. Are you essentially saying then that the weathering was more than you had anticipated? A. No, I didn't—no, no.

Q. Was the problem with the excessive waste rock one of faulting and fracturing or one of unsound, weathered

rock? A. I would say that there is no one single cause, but these are contributing factors, along with the type of operation conducted by the contractor.

Q. Would you say that, essentially, though, the rock was unsound because of the effects of the weathering, together with the faulting and fracturing? A. Some of the rock was unsound because of that; not all of the rock was unsound.

Q. Are you saying there were zones of sound rock and zones of unsound rock? A. You could possibly characterize it that way.

[93] Q. Well, is that what you observed? A. Well, let's say there were areas with sound rock and areas with more weathered rock. There were all gradations there. But to say zones—I would characterize it more as areas. But you could—you might choose to use the term "zones," but I would say "different areas."

Q. These were on the south side. A. I am speaking of the south side right now. The same could be said to be true on the north side.

* * *

[95] Q. Would you say that the percentage of specification size rock fragments which can be obtained from a quarry for riprap is primarily determined by the quality of the rock within the quarry itself?

* * *

[96] THE WITNESS: I would say that the amount that you can or that it is possible to obtain would be primarily related to the rock.

Q. By MR. JUNG: That is the percentage of specification size rock would be primarily dependent on the quality of the rock in the quarry itself. A. The percentage that it would be possible to obtain would be primarily related to the quality of the rock.

* * *

[97] Q. * * * You referred earlier today about a U.S.G.S. document that you had used in addition to the geologic map of Graham and Greenlee Counties. [98] A. Uh-huh.

* * *

Q. Did it discuss the proposed quarry site? A. No.

[99] Q. What did it discuss? A. As I said, as I recall, it was a general geology publication and it would discuss the rock types, the area of distribution, possibly the ground water resources. I'm not sure it discussed ground water resources or not. But a very general nature specific to that general area.

Q. What information did you garner from reviewing that document? A. Basically, a description of the type of rock that might be found in that area, and probably some information regarding the geologic structure of the area. I don't recall if the publication even included this specific area. It may have been an adjacent area.

Q. Is this a standard document you have in your geologic library? A. Yes, we have this in our library.

* * *

[102] Q. Let me ask you this: Have you had any training or experience in drilling and blasting operations? A. Do you mean by that question have I actually performed these operations?

Q. Either/or. Either training in the form of formal or informal education or on-hands training, or a combination. A. Well, I have observed drilling and shooting of rock on many occasions.

Q. In connection with what kinds of projects A. The construction of dams, construction of roads, around quarries.

Q. When was this ? When did you observe these operations? A. Over the last twenty years.

* * *

[104] Q. Have you ever been an active participant in a drilling or blasting operation? A. I have assisted in an advisory role.

Q. What did you advise? A. On how to drill holes, how to load the drill holes.

* * *

Q. You state in your July 27, '79 trip report that it was extremely difficult to establish a blasting pattern due to the bedrock. A. Uh-huh.

Q. Do you still maintain that position? A. Yes.

Q. In what particular respects was it extremely difficult? A. Well, in one respect it was difficult to get the drilling equipment into proper position, it was difficult to predict how the rock was going to break initially, and these things did make it difficult to establish a pattern.

Q. Your words are "extremely difficult." Is that correct? A. Oh, well, okay, I think it was extremely difficult.

**EXCERPTS FROM THE DEPOSITION OF
GEORGE SPENCER**

* * *

[3] Q. And what is your position with L.G. Everist?
A. I'm a civil engineer.

* * *

[4] Q. Are you the manager of the construction division of the company? A. In the Mid-West area, yes, ma'am.

* * *

Q. And what are your duties as manager of the construction division of the central part of the United States for Everist? A. I'm responsible for our construction projects.

* * *

[8] Q. So would this work—I think I understand you but I want to make sure I do understand. Would that work include then going to a prospective source of building material such as a quarry, looking at the quarry and deciding whether it was a suitable source for building material and how much it would cost you to retrieve building material from that source? [9] A. I have trouble with that in that I am not qualified to make all of the considerations that you set forth, but it is an economic analysis as opposed to a quality analysis.

Q. What is the difference between an economic analysis and a quality analysis? A. Well, once a particular deposit has been approved or called acceptable, then we compare the various deposits as to the degree of difficulty in working—I suppose you would say the distance from the project, the amount of material available. It's more economic investigations or determinations.

Q. And what is a quality determination? A. Quality determinations are normally done in laboratories, I think. In the final analysis they are done in laboratories.

Q. And what do you mean when you say the quality of the source? Are you talking about hardness, porosity (sp)? A. These are two of the criteria for structural integrity.

* * *

[11] Q. What is your understanding of the term 'approved' when it is used in that context?

* * *

A. If a deposit was approved as a rock source it would indicate to me that there was rock within that source that would meet the specifications as set forth in the documents. If the rock in that rock source were approved it would indicate to me that the bulk of that deposit would be suitable for the use intended.

Q. Would meet the specifications? A. Yes, ma'am.

* * *

[13] Q. Is there anything other than the distance between natural fractures that you look for in determining the size of the material that will come out of the deposit?

A. Well, needless to say, we look at the material itself if we are looking at a very loosely bonded sand stone and there is a big distance between the seams, the distance between the seams is not indicative of large [14] rock coming out. However we can go to a very good granite that would have a uniform distance between the seams of a foot or so and we will get foot or so rock out of it.

Q. Is there anything other than the kind of rock and the distance between natural fractures that you look for in determining the size of the material that will come out of the deposit? A. Basically that's it.

* * *

[24] Q. * * * What was your input into the L.G. Everist bid for the Aravaipa Creek Project? [25] A. I was responsible for assembling the bidding estimate.

Q. In its entirety? A. Yes, ma'am.

Q. Did you work for anyone in that regard? In other words, did you report to anyone who was ultimately responsible for preparing the bid? A. Yes, ma'am.

Q. Who was that? A. Mr. Sholty.

Q. Were you responsible for determining the estimated cost of obtaining rock riprap for that project? A. Yes, ma'am.

Q. And did you do that? A. Yes, ma'am.

* * *

[26] Q. Did you do anything in connection with the Aravaipa Creek Project on April 8th? A. Yes, ma'am.

Q. What did you do? [27] A. Reviewed the plans, specifications, discussed the project with people who had been there prior to this.

Q. So you did not go out into the site until April 9th? A. This is correct.

* * *

[28] Q. What instructions were you given? A. Mr. Sholty asked if I would be able to meet with Mr. Garland Everist in Phoenix on 8th of April, 1979. He informed me that early in the previous week Mr. Everist had viewed the project on what is termed a prebid showing. He informed me that Mr. Everist had attended this prebid showing and as it relates to the rock source and Mr. Kilcrease (sp) had informed Mr. Everist that the so-called Lackner Quarry was an approved rock source and also the rock in this source was approved. I subsequently met with Mr. Everist and he confirmed this information to me.

Q. What did that mean to you when someone told you that a Lackner quarry was an approved source of rock? A. The specifications are very plain—By 'specifications' I mean the contract documents,—are very plain in that they indicate the source of material to be approved by the contracting agency. In that connection I was led [29] to believe that approval at the prebid showing was a valid indication of the integrity of the source. It meant to me that material from this source would be suitable for construction of this project in accordance with the contract documents.

* * *

Q. Are you saying the specifications led you to believe that the approved rock source meant something specific [30] to you? A. Yes, ma'am.

Q. What in the specifications told you what an approved rock source means? A. Do you have a copy of the specifications with you?

Q. No, I don't. A. There is a recitaling in the specifications that indicated the contracting office will approve the rock source prior to its use, and I would have to refer to that.

Q. And that's what led you to believe— A. Yes, ma'am.

* * *

Q. Who was responsible on behalf of L. G. Everist for deciding whether Everist would use that particular [31] source or some other source? A. In the final analysis Mr. Sholty.

Q. Did you make a recommendation? A. Yes, ma'am.

Q. What did you recommend? A. I recommended we use the Lackner source.

Q. Would you tell me specifically what you did when you went to the Lackner Quarry on April 9th?

* * *

[32] A. I looked at the outcroppings of rock and noted the dimensions of the seams, noted the extent of exposures and attempted to ascertain the continuity of the deposit. I also looked at some of the construction sites or placement sites, I should say, apart from the quarry.

Q. Did you investigate any other potential sources of rock for the Aravaipa Creek Project?

* * *

A. We talked with a Mr. Gordon White (sp), I think, in connection with obtaining water. We asked him if there were other sources in the area. He mentioned the Grand Reef. We had heard it mentioned before so we did fly over it and attempted to determine its accessibility and decided it was inaccessible.

Q. Inaccessible for construction vehicles and— A. Yes, ma'am.

Q. Did you investigate any other potential sources of rock prior to the bid? A. On our flight both to the project and from the project we took an overview of the area, and in that fashion, yes, [33] we looked at some other outcroppings but we did not physically on the ground go over any other potential quarry sites.

* * *

[38] Q. I see down this list a stationary grizzly. What is that? A. Rock separating device.

* * *

Q. Why did you determine to use a stationary grizzly rather than a vibrating grizzly? A. There are many different ways of classifying riprap. In my estimate a job of this size and the type of rock we were dealing with I felt a stationary grizzly would be the proper tool to employ to meet the specifications as outlined in the contract documents.

* * *

[39] Q. What about the size? Was it small? A. This is 75,000. This is a small job in our view as far as quantity is concerned.

Q. Okay. And what about the rock source told you that a stationary grizzly would be proper? A. We were somewhat cramped as to room for equipment [40] installation early in the job. The rock source appeared to me to be competent, suitable for the use intended and we had been informed that it was an approved source and the rock in the source had been approved, which indicated to me that the construction losses would certainly be within normal amounts, ratios.

* * *

[45] Q. Now, when you went to the quarry on April 9th you parked right by the area of the gate? A. Yes, ma'am.

Q. And you walked along the creek? A. Yes, ma'am.

Q. Did you look at both sides—both quarries, the one on the north and the one on the south? A. I did not look at the quarry on the north side because it had been indicated at the prebid conference that that [46] quarry would not be approved.

Q. That it would not be approved? A. It was not approved.

Q. Or had not been approved? A. Was not.

Q. Did anyone tell you the government would not approve that quarry if asked? A. Yes, ma'am.

Q. Who told you that? A. Mr. Everist told me that he had been informed by Mr. Kilcrease that the north quarry was not approved by the soil conservation geologists, as the result it was not approved by the soil conservation.

Q. Did anyone tell you that the Soil Conservation Service would not approve that quarry if a contractor asked for approval? In other words, that that had been specifically rejected as a quarry site? A. That is my understanding. It had been specifically rejected.

Q. This came by Mr. Everist? A. It came from Mr. Everist who had been told by Mr. Kilcrease.

* * *

[49] Q. Okay. What does line Loss at 15% equals 13,000 tons mean? A. The project as outlined in the documents required 75,000 tons of material. It is my estimation— It was my estimation that the loss we could reasonably expect to encounter would be 15% or less for this deposit, therefor 15% of the gross amount of material required, which in this case is 88,000, is 13,000 tons. And that is what the line Loss at 15% equals 13,000 tons means.

Q. You estimated in order to get 75,000 tons of usable rock for the project you would have to excavate 88,000 tons? A. That's correct. Yes, ma'am.

* * *

[51] Q. Were you satisfied that the Lackner Quarry would make [52] an acceptable source of rock for Aravaipa Creek Project? A. Yes, ma'am.

Q. Did you test the rock at the Lackner Quarry for hardness? A. In my fashion I did, ma'am.

Q. How did you do that? A. I—while walking over the hill I selectively picked some of the rock that was exposed and scratched it with a piece of steel, I knocked 2 or 3 pieces of it together at each stop, which to me was an indication of hardness, tensile (sp) strength, compressive strength, durability, things of that nature. I was running a comparative test based on experience.

Q. And this was at the April 9th visit?

* * *

Q. Have you done core drilling? [53] A. Yes, ma'am, I have.

Q. Prior to test hardness, prior to bidding? A. Yes, ma'am. If I could elaborate just a minute?

Q. Sure. A. Once again the economics involved dictate the amount of investigation accomplished. When I say we have done core drilling before we have, but the contract amount would be in the ten to twenty-five million dollar range—

* * *

[57] Q. During your April 9th visit to the site did you notice any weathering on the rock? A. Yes, ma'am.

Q. How would you characterize the degree of weathering? A. What one would normally expect from a lava flow.

Q. Was it slight weathering? A. Slight to moderate.

Q. Did you make an estimate in your own mind as to how far the weathering extended down into the rock?

A. Yes, ma'am.

Q. How much? A. Very minor.

Q. Is minor a few inches or few feet or few yards?
A. Minor in my estimation would be certainly less than a few feet, perhaps in the range of 8, 10, 12 inches.

Q. Did you see any natural fractures and joints in the rock? A. Yes, ma'am.

Q. Were they extensive? A. Extensive in that I saw them over a wide area but not extensive in that they were very close together.

Q. How close were they together? [58] A. The closest I observed them was about 2 to 3 inches and the widest I saw one area where it was almost 3 feet between the closest of these joints and fractures.

Q. Did you consider whether these natural joints and fractures might cause obsessive breakage when the placing was done? A. Yes, ma'am.

Q. What did you decide? A. I decided they would not.

Q. Did you consider doing some test quarrying? A. No, ma'am.

Q. Do you know whether anyone connected with L.G. Everist did consider doing test quarrying? A. Not to my knowledge. This was never mentioned. Whether it crossed somebody's mind or not, I have no way of knowing.

Q. Is this not something that is generally done?
A. Not on a job this size.

Q. Because it is too small? A. That is correct.

* * *

[64] Q. Mr. Lackner, I'm interested in the fact that you appear to have been trained as a constructural engineer but your work has been primarily in the area of—at least somewhat in the area of geology. Do you have training in geology? A. My name is Spencer.

Q. I'm sorry. What did I say? A. Lackner.

Q. I'm sorry, Mr. Spencer. A. I have not had any formal training in geology, no, ma'am.

Q. From where do you get your geologic expertise? A. I really don't know that I have geologic expertise. I have been exposed to a lot of geology but I'm not a trained geologist.

* * *

**EXCERPTS FROM THE DEPOSITION OF
BILL CUTTER**

[8] Q. Percentage-wise, approximately how much of your time was spent at the quarry operation area? A. In the early part of the job, probably twenty percent of my time; in the latter portion of the job, probably eighty percent.

Q. Eighty percent in the latter portion.

From what date would you delineate the latter portion? A. I would have to have a calendar to reference up the jobs. I'm not sure.

Q. Midway through the job? A. Probably.

* * *

[10] Q. By MR. JUNG: I'm now going to hand you a log entry dated Wednesday, November 14th, and marked Plaintiff's Exhibit 30, and ask that you review that.

* * *

THE WITNESS: Yes, sir.

Q. By MR. JUNG: Directing your attention again to the underlined portion on the first page of the log entry, which states "Rock from last night's shot is looking really good. Has a higher percentage useable rock to waste. Maybe [11] forty percent useable to sixty percent waste."

What do you by "higher"? Higher than what? A. Higher percentage of usable rock compared to what they had been running.

Q. So they had been running over the sixty percent waste. A. Yes, as best we could tell.

Q. This report here was based on a visual estimate.
A. Yes.

Q. Your statement that "this is really looking good" then means that it's good in comparison with what had been achieved.

Is that what you're saying? A. Yes.

Q. Would you consider this good in the sense that it would be normally considered to be a good waste/rock ratio in a riprap quarry? A. No.

* * *

**EXCERPTS FROM THE DEPOSITION OF
WILLIAM K. ANDERSEN**

[21] A. The approval of the source, contractor's source, would be given by the engineer.

Q. And what set of criteria or standards contained in the specifications themselves would that approval be based on?

* * *

A. It's up to the engineer.

* * *

[48] Q. So you're saying you based your final cost estimate on the weight of rock and the type of rock that was tested that had been previously selected for testing by the geologist. Is that correct? A. True.

* * *

Q. It was stated in answer to Interrogatory No. 40 of the Plaintiff's first set of Interrogatories in this [49] litigation that you and Mr. Dornbusch had made the decision not to test quarry what is described as the proposed quarry

site in the second full paragraph of the memorandum dated November 27th, 1978. Is that correct? A. True.

Q. When was that decision made? A. I don't have a date. It would have been after this report.

Q. Yes. Why was that decision made? A. Well, one, because it was not a designated site. The contractor could pick other sources of rock.

Other than that, I don't recall, unless it was a time limitation.

* * *

[50] Q. By MR. JUNG Could an approved source also be a designated source?

* * *

THE WITNESS: That I don't know.

Q. By MR. JUNG: You drafted the 216-8 rock riprap specifications, did you not? A. Yes.

Q. And you're testifying that you don't know whether an approved source could be a designated source?

* * *

[51] THE WITNESS: I don't know.

* * *

Q. Did you conduct an archeological field trip with a Mr. Lyle Stone in connection with the project? A. I didn't conduct it; I showed him all the sites that we had on several projects.

Q. Did you show him the Aravaipa Creek project?
A. Yes.

Q. Did you take him to that area which has been designated in the geologic trip report of 11-27-78 by [52] Mr. Sanders as the proposed quarry site?

THE WITNESS: Would you repeat that.

[Record read.]

THE WITNESS: I took him to the one in the report that's referred to as the proposed quarry site.

Q. By MR. JUNG: Why did he have to be taken to that site? A. We have environmental evaluations to be made, and when government funding is used on a project we're required to have archeological clearance.

Q. Is that statutory or regulatory? Do you know? That is, the requirement that you conduct archeological investigations during your design of the project? A. Not during the design. This would be previous to the design.

Q. At some time, though, during the planning of the project, you are required to conduct environmental investigations, including archeological investigations, are you not?

THE WITNESS: Would you repeat that?

[Record read.]

THE WITNESS: Yes.

* * *

[53] Q. By MR. JUNG: Did you show him any other sources? A. No.

Q. Are you aware of any other archeological studies having been undertaken at any other time in connection with the project? A. No.

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

* * *

50. Identify each book, publication or guide relied upon or consulted by the SCS in its investigation, evaluation or testing of rock or rock sources for the Project.

Answer: Material Specification SCS-West No. 423; Personal knowledge, experience and expertise of Aubrey C. Sanders, Jr. was utilized in conducting geologic investigation of site; geologic map of Graham and Greenlee Counties, Arizona.

* * *

A58

94. Were you ever asked by a prospective bidder for the Project to approve, inspect or otherwise consider a quarry site known as the "Reef" or the "Grand Reef Mine" for use as a source of rock for the Project?

Answer: No

* * *

Office-Supreme Court, U.S.

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MAY 6 1983

No. 82-1504

ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

L. G. EVERIST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
(FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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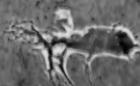


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L. G. EVERIST, INC., PETITIONER

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THE FEDERAL CIRCUIT
(FORMERLY THE UNITED STATES COURT OF CLAIMS)¹*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erred in granting summary judgment for the United States because conflicting inferences could be drawn from the uncontested facts surrounding petitioner's contractual relationship with the government.

1. On May 2, 1979, petitioner entered into a contract with the United States Soil Conservation Service ("SCS"), involving the Aravaipa Creek Emergency Watershed Project (Pet. App. A2, A6, A15). The project called for emergency restoration of the Aravaipa Creek stream bank, using rock facing known as "riprap" as a foundation to prevent erosion (*id.* at A2).

¹Effective October 1, 1982, the Court of Claims was abolished and its appellate jurisdiction transferred to the newly-created United States Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.*

On March 16, 1979, the SCS issued an Invitation For Bids that contained the contract and specifications (Pet. App. A15-A19). The specifications required the contractor to locate, select and excavate the source of rocks to be used in the project. The rock source itself was subject to approval by an SCS engineer with respect to the quantity and quality of the rock derived therefrom for use as riprap for the project (*id.* at A3, A19). The contract did not specify any particular rock source for the riprap, but a nearby quarry, known as Lackner Quarry, which petitioner used to obtain the necessary rocks, had been approved by the government (*id.* at A5). The Invitation For Bids urged bidders to visit the site and examine the nature and location of the work (*id.* at A7, A16).

Shortly after the contract was awarded to petitioner, its quarrying operations produced an excessive amount of undersized rock due to breakage that failed to meet the contract specifications for riprap. This quarrying problem resulted in a 70-day delay in completing the project and in greater than anticipated expense to petitioner (Pet. App. A6). Liquidated damages for the delay were assessed against petitioner.

In accordance with the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 605(a), petitioner submitted claims to the Contracting Officer for the amount of liquidated damages and for \$478,268 under the contract's Differing Site Conditions clause, which permitted an equitable adjustment if physical conditions at the site differed materially from those indicated in the contract. Petitioner's claims were denied by the Contracting Officer on September 11, 1980 (Pet. 8; Pet. App. A6).

2. Petitioner filed this action under 41 U.S.C. (Supp. V) 609 in the Court of Claims seeking de novo review of its claims against the United States for equitable adjustment under the contract and for fraudulent misrepresentation

and intentional failure to disclose information available to SCS regarding the condition of the rock at the Lackner Quarry. The court granted summary judgment for the government pursuant to Court of Claims Rule 101(d), which is identical in all material respects to Fed. R. Civ. P. 56(c).

The Court of Claims rejected petitioner's claim of fraudulent misrepresentation of the quality of the rock source on grounds that the contract and the specifications drew a clear distinction, understood by the parties, between the required physical characteristics of the riprap and the commercial requirements concerning the quality and quantity of the rock source from which the riprap was to be derived (Pet. App. A7). The court also rejected petitioner's claim that the government withheld superior knowledge concerning the rock's potential for excessive breakage on the ground that petitioner had access to the same information as the government concerning the rock's waste potential (*id.* at A8-A9). Finally, the court rejected petitioner's claim under the contract's Differing Site Conditions clause because the terms of the contract made it clear that Lackner Quarry was not the work site to which the clause applied; it was merely a potential source of rock to be used at the work site (*id.* at A9).

3. The Court of Claims correctly determined that the record presented no genuine issue of material fact for purposes of disposing of the case on summary judgment. Petitioner argues (Pet. 10-16) that the court's decision is premised upon an improper standard for granting summary judgment and is thus inconsistent with *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In those cases this Court held that the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, but neither case required a trial

where, as here, conflicting inferences drawn by one litigant are plainly unreasonable. See *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975); cf. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968). In the present case, the Court of Claims carefully considered the conclusions reached by petitioner based on the undisputed underlying facts and held that petitioner's claims were factually unsupported. The decision below is thus fully consistent with this Court's decisions; moreover, since the decision affects no one other than petitioner, it does not warrant review by this Court.²

Petitioner also argues (Pet. 15-16) that the Court of Claims, by granting summary judgment, deprived petitioner of its statutory right to a trial de novo under Section 10 of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 609. But petitioner received de novo review of its claim, because the court's analysis was in no way limited by the

²Petitioner discusses at length (Pet. 16-30) the inferences it draws from the facts, but those fact-specific arguments were fully considered and properly rejected by the Court of Claims. With regard to the misrepresentation claim, the court correctly held that the government's representations that the quality of rock at the quarry was "approved" and that the quarry contained an adequate quantity of rock were no basis for assuming, as petitioner did, that the quarry site would supply rock at any particular cost. At most it was a representation that an adequate supply of rock was available at the Lackner Quarry, but petitioner does not deny that it obtained all the rock it needed from that quarry.

With regard to the claim of superior knowledge, the court found that the government had no access to information not reasonably available to petitioner. Indeed, petitioner's employee reached nearly an identical conclusion regarding the nature of the quarry (Pet. App. A3), but petitioner decided to bid on the project without further testing. Finally, as the Court of Claims held (*id* at A9), the "Differing Site Conditions" clause was never intended to cover a quarry neither owned by the government nor designated as the source for rock for the project.

prior determination against petitioner by the Contracting Officer. Disposition of the case by summary judgment because no material facts were in dispute was fully consistent with the requirements of the Contract Disputes Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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ALEXANDER L. STEVAS,
CLERK

No. 82-1504

In the Supreme Court of the United States

October Term, 1982

L. G. EVERIST, INC.,
Petitioner,

vs.

THE UNITED STATES.

**PETITIONER'S REPLY TO THE MEMORANDUM
FOR THE UNITED STATES IN OPPOSITION**

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The Government contends that the inferences of fact drawn by the petitioner in this case are "plainly unreasonable." (Opp. 3-4) The Court of Claims, however, *never* held that any of the inferences of fact drawn by the petitioner in this case were in any way unreasonable. The Government contends that the Court of Claims held that the conclusions drawn by the petitioner in this case were "factually unsupportable." (Opp. 4) The Court of Claims, however, *never* held that any of the conclusions drawn by the petitioner in this case were in any way factually unsupportable. *The Government cannot—and does not—point to any such statements or holdings by the Court of Claims in this case.*

Rather, the Court of Claims *specifically* held that it was undertaking summary judgment in this case *not* upon any finding that the inferences and conclusions of fact drawn by the parties were not in genuine dispute, but *solely and expressly* upon the Court's conclusion that the "underlying" material facts contained in the record were *themselves* not in genuine dispute.

"Before reciting the facts, we note our conclusion that there are no genuine issues of material fact in the record which would, in themselves, preclude summary judgment. While the inferences and conclusions drawn from the facts by the parties differ radically at times, *the underlying material facts are not in genuine dispute.*" (Pet. App. A2) (Emphasis added.)

Indeed, the Court of Claims thus recognizes—and acknowledges—that the inferences and conclusions of fact drawn by the parties in this case are in fundamental dispute.

Where conflicting inferences of fact are properly drawn from the "underlying" facts, summary judgment

is wholly inappropriate. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). On a motion for summary judgment, a court may not speculate as to the ultimate findings of fact. *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 506, 89 S. Ct. 1252, 1260 (1969).¹ Moreover, on a motion for summary judgment, the moving party has the burden of demonstrating the absence of a genuine issue as to any material fact, *including any inferences of fact*. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-160, 90 S. Ct. 1598, 1608-1610 (1970). All such inferences must be viewed in the light most favorable to the non-moving party. *Diebold, supra*; *Adickes, supra*. The Government, as the moving party, must conclusively show that the facts contained in the record are "not susceptible" of an interpretation that might give rise to the inferences drawn by the petitioner. *Adickes, supra* at 160, n. 22, 90 S. Ct. 1610, citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1593 (1968). "[A]ny doubt as to the existence of a genuine issue of material fact must be resolved against . . . the moving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-159 (1970)." *Board of Education v. Pico*, U.S., 102 S. Ct. 2799, 2806 (1982) (Opinion of Brennan, J.)

The United States has never attempted to show that any of the crucial inferences of fact drawn by petitioner in this case are anything other than entirely reasonable and proper. Indeed, the Government has simply restated the alleged inferences which it draws from the underlying facts. Such assertions by the Government serve only to

1. See also *Empire Electronics Co. v. United States*, 311 F.2d 175, 179-180 (CA 2 1962): "This case presents us with a situation where the so-called evidentiary facts—the underlying physical data—are not in dispute; but the inferences of fact to be drawn from them are disputed. * * * 'A judge may not, on a motion for summary judgment, draw fact inferences.'" (Kaufman, J.)

confirm the existence of issues of ultimate fact, not to demonstrate the propriety of summary judgment.²

2. The Government states that "The specifications required the contractor to locate [and] select . . . the source of rocks to be used in the project." Yet, the Government fails to provide *any* reference to such alleged "specifications." (Opp. 2) In fact, Construction Specification 216-8, "Rock Riprap" expressly directs—at Section 2, "**MATERIALS**"—that "Rock from the designated sources, or from other sources approved by the Engineer shall be excavated, selected, and handled as necessary to meet the grading requirements in Section 8 of this specification or on the drawing," thus specifically establishing a *mandatory* item of subsurface contract work. (Pet. A19) In conjunction with Construction Specification 216-8, Clause 2—"SPECIFICATIONS AND DRAWINGS"—of the General Provisions further expressly provided that: "The Contracting Officer [including his authorized representative] shall furnish from time to time such . . . other information as he may consider necessary, unless otherwise provided." (Pet. A17)³ On April 4, 1979 the Project Engineer (who

2. The Government states that "Petitioner discusses at length (Pet. 16-30) the inferences it draws from the facts, but those fact-specific arguments were fully considered and properly rejected by the Court of Claims." (Opp. 4, n. 2) As noted above, however, the Court of Claims explicitly decided this case *not* upon any conclusion that the conflicting inferences and conclusions of fact drawn by the parties were not in genuine dispute, but *solely and expressly* upon the court's conclusion that the underlying facts *themselves* were not in genuine dispute. (Pet. App. A2) Indeed, the court acknowledges that the inferences of fact drawn by the parties are in *fundamental* dispute. "Selecting one set of conflicting inferences, as opposed to another, is part of the ultimate fact-finding process, not of the disposition at the summary judgment stage." *Cole v. Cole*, 633 F. 2d 1083, 1089 (CA 4 1980).

3. Cf. *Emery & Co. v. American Refrigerator Co.*, 246 U.S. 634, 637, 38 S. Ct. 414, 415 (1918) (Holmes, J.). ("[T]he con-

(Continued on following page)

was also the authorized representative of the Contracting Officer) conducted a group, pre-bid "worksitc" tour of the Lackner Quarry in accordance with the special "INSPECTION OF WORKSITC" provision contained in the Invitation for Bids. (Pet. 23-24) Pursuant to Clause 2 of the General Provisions, the Project Engineer provided the necessary *further identification* of the Lackner Quarry—already expressly referred to in Section 2 "MATERIALS" of Construction Specification 216-8 as the "designated" and "approved" source—by personally identifying its location for the benefit of the prospective bidders, as an integral part of the worksite tour. (Pet. 19-21) In this regard, the Project Engineer expressly testified: "The designated area was approved, yes." (Pet. A28) (Emphasis added.) Cf. *S.J. Groves & Sons Co. v. United States*, 106 Ct. Cl. 93, 100-101, 121-125 (1946). The Project Engineer further instructed the prospective bidders that: "The rock is going to come from the Lackner Quarry." (Pet. App. A32-A33) Petitioner's President testified that, prior to the bidding, it was his understanding of the contractual requirements that "the material would come from designated source," and that the Lackner Quarry was the designated source. (Pet. 20) The Government has never even attempted to address the foregoing facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.*

The Government states that "the court rejected petitioner's claim under the contract's Differing Site Conditions clause because the terms of the contract made it

Footnote continued—

tract 'is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfillment is like the reference to a document that it adopts and makes part of itself.' *Louisville & Nashville R.R. Co. v. Western Union Telegraph Co.*, 237 U.S. 300, 303."

clear that Lackner Quarry was not the work site to which the clause applied; it was merely a potential source of rock to be used at the work site (*id.* at A9).” (Opp. 3) The Court of Claims, however, *never* held that “the terms of the contract made it clear” that the Lackner Quarry was not part of the Project worksite for purposes of the Differing Site Conditions clause, and *no such statement is contained anywhere in the opinion of the Court of Claims, either on page A9 or elsewhere.* (Pet. App. A1-A12) General Provisions Clause 4—“DIFFERING SITE CONDITIONS”—contained in the Invitation for Bids expressly provides that “an equitable adjustment shall be made” for “(1) *Subsurface or latent physical conditions at the site differing materially from those indicated in this contract,* or (2) *unknown physical conditions at the site,* of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in *work of the character provided for in this contract.*” (Pet. A17-A18) (Emphasis added.)⁴ Construction Specification 216-8, as noted above, expressly established the excavation, selection and handling of the rock from the Government-designated Lackner Quarry as a mandatory item of *subsurface contract work.* As such, that excavation, selection and handling of the rock at the Government-designated Lackner Quarry was, by definition, “at the site” within the meaning of the Differing Site Conditions clause; and the excessive waste rock which was encoun-

4. The Government’s version of the Differing Site Conditions clause alluded to in its Memorandum in Opposition refers only to category “(1)” relating to conditions differing materially from those indicated in the contract. (Opp. 2) Petitioner, however, submitted its claim for the excessive waste rock condition encountered at the designated Lackner Quarry pursuant to both category (1) and category (2) of the Differing Site Conditions clause, and its cause of action for an equitable adjustment in the Court of Claims was expressly based on both category (1) and category (2) of the Differing Site Conditions clause (Pet. A2; A9)

tered at that source was therefore clearly and explicitly within the coverage of the mandatory equitable adjustment provisions of that clause. (Pet. 25) The Government has *never* addressed these facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.*

Moreover, the Assistant Contracting Officer for the Project, who attended that pre-bid worksite tour on April 4, 1979, *expressly* testified that the Lackner Quarry was shown to the prospective bidders by the Project Engineer *as an integral part of the Project worksite.* (Pet. 24) Furthermore, the Government itself treated the quarry operation at the Lackner Quarry as an integral part of the Project contract "work," throughout the performance of the contract. (Pet. 25, n. 13) The Government has *never* attempted to show that the foregoing evidence is not susceptible of an inference that the Lackner Quarry was fully intended to be "at the site" within the meaning of the Differing Site Conditions clause. *Adickes, supra.* Indeed, these facts, and the inferences drawn therefrom, provide *clear and convincing* evidence that the Lackner Quarry was fully intended to be "at the site" under the Differing Site Conditions clause.

The Government asserts that "Finally, as the Court of Claims held (*id.* at A9), the 'Differing Site Conditions' clause was never intended to cover a quarry neither owned by the government nor designated as the source of rock for the project." (Opp. 4, n. 2) *The Court of Claims never held, in this or in any other case, that the Differing Site Conditions clause was "never intended" to apply to such quarries or other project materials sources not owned by the Government, and no such statement appears either on page A9, or on any other page of the court's order of summary judgment.* (Pet. App. A1-A12) Indeed, the Court of Claims, as well as the Federal Boards of Contract Appeals, have

on countless occasions directed equitable adjustments to be made under the Differing Site Conditions clause for such conditions encountered at privately-owned project materials sources. See, e.g., *Briscoe v. United States*, 194 Ct. Cl. 866, 442 F. 2d 953 (1971); *Morrison-Knudson Company, Inc. v. United States*, 113 Ct. Cl. 536 (1949); *Construction Aggregates Corp.*, ENG BCA No. 4242,81-1 BCA ¶14,855 (Dec. 31, 1980) (Government-“approved,” privately-owned, commercial quarry).⁵ Furthermore, as noted above, the record in this case provides abundant evidence in support of the irrefutable conclusion that the Lackner Quarry was the contractually designated source of rock for this Project. (Pet. 19-21)

Moreover, the failure of the Lackner Quarry to provide the specified 75,000 tons of rock riprap without excessive waste constituted distinct breaches of the Government's express and implied warranties of suitability of that source. (Pet. 16-21) In designating the Lackner Quarry as the source of rock for the Project, the Government *impliedly* warranted that the quarry would serve as a commercially suitable source of rock for the Project. (Pet. 19-21) See, e.g., *Tobin Quarries, Inc. v. United States*, 114 Ct. Cl. 286, 84 F. Supp. 1021 (1949) and *United States v. Johnson*, 153 F. 2d 846 (CA 9 1946). In addition, the Government in this case *expressly* warranted the suitability of the Lackner Quarry as the source of rock for the Project. (Pet. 16-19) Construction Specification 216-8 expressly provided that “The suitability of the rock for riprap shall be approved by the Engineer.” (Pet. A19) During the Government's pre-

5. Not only does the Differing Site Conditions clause make no reference whatsoever to the “ownership” of the site as affecting the scope of its coverage, but the regulations under which this Project was undertaken specifically contemplate and provide that such Soil Conservation Service projects will in many instances be performed on privately-owned worksites. See, e.g., 7 CFR §624.8 and 7 CFR §656.6(g)(2).

bid worksite showing of the Lackner Quarry, the Project Engineer instructed the prospective bidders that the rock at that source was "approved" and that the Government geologist had determined that it was rock "of quality." (Pet. 17) He further advised the prospective bidders that the Government geologist had determined that the rock was "hard enough for riprap", by which he further testified that he meant "The hardness is such that it won't break up in handling." (Pet. 17; 22) Petitioner's Construction Manager, who prepared the bid for the Project, testified that: "The rock source appeared to me to be competent, suitable for the use intended and we had been informed that it was an approved source and rock in the source had been approved, *which indicated to me that construction losses would certainly be within normal amounts, ratios.*" (Pet. 17) (Emphasis added.) The Government has never addressed any of the foregoing facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.* As the Government itself admits, the construction losses encountered at the Lackner Quarry were indeed far from normal: well over 60-70% of the total rock material excavated, selected and handled from that source—*by the Government's own count*—was unsuitable for use as riprap, resulting in enormous unanticipated costs and delays in the performance of the contract. (Pet. 7; Pet. App. A24; Opp. 2)

In addition to the breach of its express and implied warranties, the Government further breached this contract by its non-disclosure of its actual superior knowledge concerning the geological conditions affecting the suitability of the rock at the Lackner Quarry. (Pet. 27-30) And in this case the Government went beyond non-disclosure, and engaged in active concealment. (Pet. 21-22) Not only were the November 27, 1978 geological Trip Report, and the conclusions and the recommendations of the

Government geologist contained therein, not disclosed to the prospective bidders, but the Project Engineer *affirmatively* represented to the prospective bidders that the Government geologist had *approved* the source, and that he had determined that it was rock of quality and hard enough for riprap. In the face of the Government's geologist's actual conclusions and recommendations, the Government's statements to the prospective bidders constituted a gross misrepresentation of the facts. (Pet. 21-22) Moreover, the Government's contention that "petitioner's employee reached nearly an identical conclusion regarding the nature of the quarry" (Opp. 4, n. 2) *has absolutely no support in the record of this case*. The Government geologist testified that, on the basis of his geological site investigation in November, 1978, he was not surprised by the excessive waste actually encountered by petitioner at the Lackner Quarry, and that indeed *he expected such excessive waste to be encountered*. (Pet. 29) Petitioner's Construction Manager, by contrast, expressly testified: "*The rock source appeared to me to be competent, suitable for the use intended*, and we had been informed that it was an approved source and the rock in the source had been approved which indicated to me that construction losses would certainly be within normal amounts, ratios." (Pet. 17) (Emphasis added.)⁶ The Government has never responded to the foregoing facts, and the inferences drawn therefrom by petitioner. *Adickes, supra*.

3. The Government contends in its Memorandum in Opposition that "since the decision affects no one other

6. The Government geologist testified that the fractures and joints which he observed were the result of geological faulting, and that accordingly subsurface weathering of the bedrock was to be expected to be encountered. (Pet. 28-29) Petitioner's Construction Manager, a civil engineer, expressly testified he did *not* expect the subsurface bedrock to be weathered. (Pet. 27-28)

than petitioner, it does not warrant review by this Court." (Opp. 4) But the United States Court of Appeals for the Federal Circuit expressly adopted *all* of the holdings of the Court of Claims announced prior to the close of business on September 30, 1982, and, accordingly, the holding of the Court of Claims in the instant case becomes part of the body of law of that newly-established Federal judicial circuit. *South Corporation v. United States*, 690 F. 2d 1368, 1369 (CAFC 1982). Furthermore, the summary judgment rule prescribed by the Court of Claims in this case is in direct conflict with the basic rule of summary judgment prescribed by the Supreme Court in *United States v. Diebold, Inc.*, *supra*, and in direct contravention of petitioner's statutory right to trial *de novo* under §10(a) of the Contracts Disputes Act of 1978 (41 U.S.C. §609(a)). The Court of Claims has, in this case, so fundamentally erred and so completely and openly departed from the usual and accepted course of judicial proceedings as to fully warrant the exercise of this Court's power of supervision. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 77 S. Ct. 309, 313-314 (1956); *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124, 76 S. Ct. 663, 668 (1956). This case presents a most fitting occasion for the Court to reaffirm that all orders of summary judgment—whether published or unpublished—must accord with the basic rules of practice and procedure prescribed by the Supreme Court.

It is therefore respectfully requested that the petition for writ of certiorari be granted, that the order of summary judgment be vacated, and that this case be remanded to the United States Claims Court for the trial *de novo* of the disputed issues of fact, in accordance with 41 U.S.C. §609(a)(3).

BERNARD M. JUNG